

103
TENANTS LAW: 4

OR, THE

L A W S

CONCERNING

Landlords, Tenants, and Farmers.

(VIZ.)

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|---|--|
| 1. Of the several Kinds of Tenants and Tenures. | ration in Ejectment on Tenants in all Cases. |
| 2. Of Leases, Covenants, Conditions, Provisoes, Reservations, Surrenders, and Assignments of Leases. | 8. Of Common for Cattle. |
| 3. Payment of Rent, Acceptance and Extinguishment thereof, Demands, Entries, Continuance, Limitations, and Determination of Leases. | 9. Observations on Stat. 29 Car. 2: chap. 3. as to Frauds in buying or selling Lands or Goods. |
| 4. Of Title to Crops growing, Trees blown down, &c. | 10. Of Trespasses and Nuisances to Farmers in particular. |
| 5. Plain Directions for distraining for Rent, of Replevins, Avowries, and Rescous. | 11. Modern Remarks on Covenants in Leases. |
| 6. Of what is, or is not waste. | 12. Of recovering Rents from, and turning out of Possession Lodgers, and of the Welch Ejectment. |
| 7. Of Ejectments, with special Instructions for serving the Declaration in Ejectment on Tenants in all Cases. | 13. The new Building Act of 14 Geo. 3. chap. 78. |
| | 14. Appendix of Precedents, wherein these with Lodgers are particularly attended to. |

Useful for all Landlords, Tenants, Farmers, Stewards, Agents, Solicitors and others, concerned in the buying, selling, or letting Estates.

The SEVENTEENTH EDITION, revised, with all the Modern Cases:

In which are introduced all such Acts of Parliament and Resolutions, as relate to these Subjects, down to the present Year.

L O N D O N:

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THE STATE OF TEXAS
COUNTY OF DALLAS

Know all men by these presents, that

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12/12/33

For and in witness whereof, the said

ERRORS.

Page 48. line 28. for p. 9. read p. 46.

Page 84. l. 18. for c. 13. read c. 3.

Page 168. l. 23. for *the person*, read *to the person*.

Page 215. for 17, 56. read 1756.

Page 238. l. 8. for *goods* read *catile*.

Page 344. l. 3. add *chap. 78*.

Page 405. l. 18. for *he* read *the landlord*.

Page 406. l. 8. for *landlord* read *tenant*.

ERRORS

- Page 28. line 28. for a. 9. read a. 10.
Page 34. l. 18. for c. 13. read c. 14.
Page 108. l. 23. for the person, read to the per-
son.
Page 222. for 17. 50. read 17. 10.
Page 238. l. 8. for good read catin.
Page 322. l. 3. add that. 78.
Page 402. l. 18. for he read the lordship.
Page 406. l. 8. for making read making.

CONCERNING
Landlords and Tenants.

*A Division of the Several Kinds of Tenants
and Tenures.*

And divers and various are the natures and kinds of tenants and tenures in this land at this time; although they have been more numerous, and were indeed of excessive slavery to the people, so that

that their exorbitant cruelty hath caused their dissolution.

Those which are ceased to be, are tenure in *villanage*, where the lord might vassal and enslave his tenant's person at his pleasure, but not kill him.

Pillenage, where the lord might pillage his tenant of all his goods.

Frank-Almoina, or free alms, was a tenure begun, and had its original, either at or soon after the foundation of *monasteries* and religious houses, and extirpated with them. The nature of it in old time was, when a man being seised of lands or tenements in his *demefne* as of fee, of the same land did enfeof some abbot or prior, and their convents, or some dean and chapter, and their successors, or some parson of a church, and his successors, or any other religious person who was in a capacity to take such alms, to hold the same lands and tenements to them and their successors, in *liberam elemosynam*, in free alms or *Frankalmoina*, of the grantor and his heirs: And such as held in free alms were bound, in consideration of such grant or feoffment, to perform certain divine and religious services and exercises, for the soul's good, life and prosperity of the grantors, and all others.

And they confirmed all their grants with grievous *anathemas* and imprecations against all such, as should in any ways diminish or take away such their grant, or convert the same unto any other use; which some sillily and superstitiously believe to be none of the least causes, why purchasers of church lands find such ill success, and seldom do enjoy it to the fourth generation.

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But, as is said before, this tenure and the religious houses ended together, or immediately one after the other, so that none can grant any lands or tenements *in liberam elemosynam* at this day.

Tenure *in capite* and *Knight's Service* was also by Act of Parliament *Anno 12 Car. 2. cap. 24.* (together with the court of wards, which was dependant upon that service) taken away, and all those tenures are now turned into free and common *socage*.

Also tenure by *Grand Serjeanty* was a kind of tenure by knight's service, and so was tenure by *escuage*, because the king had the wardship and marriage of such tenants under age; and though these tenures are taken away by the said *Stat. 12 Car. 2.* yet the honorary services of grand serjeanty still continue.

But it is said, that tenure by *petit serjeanty* is no more than a *socage* tenure in effect, because the tenant is not thereby bound to do any thing in his proper person touching the wars, and had not wardship, marriage or relief annexed; yet this seems to be also taken away by the said statute.

So that the more usual tenants among us at this day, are,

Tenants in *Fee-Simple*, and in *Fee-Tail*.

Tenant *in tail* after possibility of issue extinct.

Tenant *in dower*, and by the *curtesy* of *England*; tenant for term of life, or for years, upon lease in writing, or lease-parol.

Tenant *at will* by the common law, or by custom.

Tenant *at sufferance*.

Tenant by *Copy of Court-Roll*.

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Tenants in Coparcenary, Joint-Tenants and Tenants in common.

Fee-Simple.

A man that is seised in lands or tenements, to hold to him and his heirs for ever, is said to be tenant in fee-simple; and such an estate is called *Feodum Simplex*. The word *Feodum* in Latin, being taken to signify inheritance; and *simplex* implies pure, plain or unmixed: And indeed fee-simple is the most pure holding; that is, being unmixed or intangled in itself. But as the whitest colour will be soon stained, so is this pure tenure most subject to be spotted and involved in troubles above any other; which the law calls *incumbrances*. Lit. Ten. Lib. 1. cap. 1.

If a man was to deal as purchaser with a tenant in fee-simple, he hath a happy bargain if he meets with a simple tenure and a simple tenant; I mean the one free from incumbrances, and the other from deceit; which many have found it a difficult thing to obtain.

I shall therefore, by way of caution, set down the several troubles and incumbrances this pure tenure, called *Fee-Simple*, is subject unto.

Fee-Simple may be incumbered with several judgments, statutes-merchant, and of the staple, recognizances, mortgages, wills, pre-contracts, bargains and sales, feoffments, fines, amerciaments, jointures, dowers, and many other fraudulent conveyances, if a knave once possess it; and last of all, may be quite forfeited for treason, or felony that incurs forfeitures.

But

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But fee-simple being free from any of the above-mentioned incumbrances, is the most free, absolute and ample estate of inheritance that any man can have; and therefore a tenant in fee-simple is said to be *seisus in dominico suo ut de feodo*; that is, seised in his demesne as of fee.

Tenant in Fee-Tail.

All freehold inheritances, before the statute of *Westminster 2. cap. 1. De Donis conditionalibus*, were fee-simple at the common law; but there were fee-simples conditional; so that tenant in tail was instituted by force of that statute; by which statute there is a two-fold tenant in tail, viz.

General and Special Tail.

He is said to be tenant in general tail, who holdeth lands or tenements to him and to the heirs of his body begotten.

For if in this case he marry many wives, and have issue by them all, every one of them may (the elder dying) come to inherit this land, because every one is the issue ingendered of his body.

It is the same case if lands or tenements be invested upon a woman and the heirs of her body, and she have several husbands, and children by them all, every one of them is in a possibility to inherit those tenements, being all begotten of her body.

But where lands or tenements are settled upon a man and his wife, and the heirs of their bodies between them two lawfully to be begotten, this is tenant in special tail; because in this case none

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can inherit but such children as are by this man begotten upon the body of this wife named in the grant: And that if the wife die and the man taketh another wife, and hath issue of her body, the issue by the latter wife cannot inherit by virtue of such a grant. And if the first husband die, and the wife marry again, and have issue by a second husband, that issue cannot inherit. *Lit. Ten. l. 1. c. 2. f. 5. a.*

There be several other estates in special tail, according to the devises, limitations and conditions, invented and settled by the *donor*; as sometimes to a man and his wife, and the heirs male of their bodies between them two to be begotten: In this case the females cannot inherit. *Et e contra*: For if limited to heirs females of their bodies, then the males cannot inherit.

So that if lands be invested upon a man and the heirs male of his body, and he hath issue two sons, and dieth, the eldest enters according to the grant, and hath issue a daughter, and dieth, this daughter shall not inherit the land, but the brother, because he is the heir male.

And if a man hath lands granted to him, and to the heirs male of his body, and he hath no son, but only a daughter, and the daughter hath a son, and dieth, living her father, and after that the *donee* dieth; in this case the *donee* dying without issue male in the law, the son of his daughter, which is the grand-child, shall not inherit, but the entail is extinct, and the land shall revert to the *donor*, for the entail must be carried on entirely by the male line.

These grants in tail are the cause of much strife, and stir up many chargeable suits, though in my judgment

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judgment they are useless. For the intent of the *donor* is seldom observed in them, he intending to preserve the memory of his own name to perpetuity; which cannot be, since a fine and recovery will now bar and dock it.

For the said statute *De Donis, &c.* being made 13 *Ed. 1.* established a general perpetuity in estates descendible for all that would make it; so that most estates were consequently entailed *in perpetuum* by the *donor*, on the heirs of the *donee*; which, being against the policy and reason of the common law, became the occasion of many mischiefs; for lords were often thereby defeated of their escheats, and other duties and services, and purchasers and tenants often lost their estates, and were evicted by the heirs of the grantors, and lessors; for the ancestor could not bind his estate farther than for his own life.

These mischiefs were often attempted to be redressed in divers parliaments, and divers bills to that end were exhibited, which were always rejected on one pretence or other; but the true reason was, the lords and commons knowing that their estates-tail were not forfeitable for felony or treason (as estates in fee-simple were,) and finding they were not liable to the debts, incumbrances, sales, alienations or leases of their ancestors, did always reject such bills.

This continued until about the 12th of *Ed. 4.* when the judges, upon consultation among themselves, did agree and resolve, that an estate-tail might be docked and barred by a common recovery, and that by reason of the intended recompence in value a common recovery was not

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within the restraint made by the said statute *de donis conditionalibus*.

If tenant in tail general or special die without issue, the *donor* or his heirs shall enter as in their reversion; for in every gift in the tail, without more saying, the reversion of the fee-simple is in the *donor*. Lit. Ten. l. 1. c. 2. f. 3.

Tenant in Tail after Possibility of Issue extinct,

When lands and tenements be granted to a man and his wife in special tail, and one of them die before they have issue, the survivor is tenant in tail, after possibility of issue extinct; but if they have issue, during the life of the issue, the *survivor* cannot be said to be tenant in tail after possibility of issue extinct: But if the issue die without issue, and leave none to inherit by virtue of the entail, then the surviving *donee* is tenant in tail after possibility of issue extinct. Lit. Ten. l. 1. c. 3. f. 7.

And none can be tenant in tail after possibility of issue extinct but one of the *donees* in special tail; which tenant in tail, after possibility of issue extinct, is not chargeable for committing of waste, because the inheritance was once in him; but if he doth alien in fee, it is a forfeiture of his estate, and the heir in reversion may enter. For several other privileges and qualifications of this tenant, *vide Co. Lit. f. 27. b. Fitz. Waste 125. Kitch. f. 228.*

Tenant

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Tenant by the Curtesy of England.

When a man marries a wife seised in Fee-simple, or in general Fee-tail, or one that is heirless unto lands or tenements in special, and hath a child by the same wife, male or female, born alive, and the wife die; whether the child be living or dead, the husband shall hold the same lands during his life, as tenant by the curtesy of *England*, which is a tenure used in none other country but *England*: And although the child die as soon as it is born, if it were but heard to cry, the husband shall hold the lands after his wife's decease, during his life, as tenant by the curtesy; the crying of the child being a sufficient testimony of its being born alive. *Lit. l. 1. c. 4. f. 8.* Though the child is not heard to cry, if there is sufficient proof of its being alive, it is sufficient.

Tenant in Dower.

This kind of tenant is alway of the feminine gender; and is, when a man who is seised of lands or tenements in Fee-simple, or in general tail, or is heir in special tail, marries a wife, and dies, the wife, after the death of her husband, shall have during her life the third part of such lands or tenements as her husband had during the coverture, whether she had any issue by him or not, so she be above nine years of age at her husband's death. *Lit. l. 1. c. 5.* This is dower at the common law, but by custom in many places it is otherwise; for in some places she shall have the half, and in others the whole; and in all these cases she is tenant in dower.

In *Kent* it is the custom for the woman to have half her husband's lands *durante viduitate*, so long as she continues a widow, and without child; but if she marry again, she loses all: So likewise is the custom there, if a man marry a wife, having an estate in lands, &c. and she die without issue, he shall have half while he remains sole; but if he marry again he loseth all. And in *Kent* they say, the reason thereof is, because they do not love that their lands should help to maintain any children, but such as are of their own getting; but how sure they are thereof *ignoramus*.

That by the custom of some towns or boroughs, she have the whole. See more of this, *Co. Lit.* 31, 33. That there needs no livery and seisin to an assignment of dower. *Co. Lit.* 35. And that it must be of some part of the land, or of a rent issuing out of the same. *Ibid.* & *Dyer* 91. See more in *Lit. on Ten.* l. 1. c. 6. f. 11. and *Co. Lit.* on the chapter of dower.

One devised a sum of money to his wife, on condition she would renounce her dower; she accepted of the legacy, and yet the chancery decreed that she was not barred of her dower thereby. It was further held, that she being an orphan, and her portion remaining still in the chamber of *London*, it should be considered as a debt due to her before marriage, and remain to her; and that the executors of the husband were not intitled to it. *Pheasant versus Pheasant*, in *Chanc. Trin.* 22 *Car.* 2. *Cases in Chancery*, 1st part, p. 181.

Tenant

Tenant for life.

He that holdeth lands or tenements for the term of his own life, or for the term of the life of any other person: In this case, the lessee, either for the term of his own life, or for another's, is tenant for term of life: And this tenant for life hath in him the freehold, this being the lowest degree of freehold. *Lit. Ten. l. 1. c. 6.*

If a man be tenant for term of his own life, he hath a higher estate than he that is tenant for the life of another. *Co. Lit. 42. a.*

Note; A lease for life must be executed with livery because an estate for life is a freehold. See after.

In a grant for term of life, it is said to be from lessor to lessee. *Note;* There is *Feoffor* and *Feoffee*, *Donor* and *Donee*, *Lessor* and *Lessee*; there is likewise *Grantor* and *Grantee*, *Obligor* and *Obligee*, *Mortgager* and *Mortgagee*.

He that enfeoffeth another in lands or tenements, is called the *Feoffor*; he to whom the feoffment is made, is the *Feoffee*.

So when a man giveth lands or tenements to another in tail, he is called the *Donor*; and he to whom the gift is made, is the *Donee*.

And likewise he that letteth to another any lands or tenements to hold for term of life, for years, or at will, is called the *Lessor*; and he to whom the lease is made, is called *Lessee*: Which lessee for life (as I said before) is tenant of freehold. So also he that pawneth land to another, is called *Mortgager*; and he to whom it is pawned, is called the *Mortgagee*.

Tenant for life is punishable for waste, and may commit a forfeiture.

By Stat. 4 & 5 An. all warranties made by tenant for life of any lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, are void.

Tenant for Years.

Tenant for term of years, is when a man demiseth, and letteth any lands or tenements to another to hold for a certain number of years agreed upon between the lessor and the lessee; by force and virtue of which lease the lessee entereth into the said tenements.

This lease for term of years may be granted by word of mouth, and this is called a *Lease Parol*; which formerly bound the lessor so long as the term was accorded for, if the witnesses lived to prove the lease parol.

But now the more safe and usual way is to take a lease by deed indented, which needs no other execution but only sealing and delivery. For by virtue of that lease, the tenant may enter whensoever he will.

By the statute for prevention of frauds and perjuries, viz. 29 Car. 2. c. 3. Leases parol, or by word of mouth only, will be void, if they exceed three years from the making; and full two third parts at least of the improved value of the thing demised, must be reserved to the landlord. See after, Chap. II. and Chap. VIII.

And no leases, estates or interests, either of freehold or terms for years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of
any

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any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed, or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law. Same statute.

And no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party, or some other party by him lawfully authorized. Same statute. See Chap. VIII. p. for observations on this statute.

Every one seised of an absolute estate in Fee-simple in his own right may make a lease for as many years as he pleaseth, provided it be not a body politic, who are limited to a certain time, which, if they exceed, it is either void, or a devise in mortmain; and in this case the chief lord may enter for the forfeiture, unless they have purchased licence from the king and the said chief lord. See 29 H. 8 Mortm. 39. Stat. 23 H. 8. 10, &c. Fitz. 221. F. 222. D. 223. E.

But now by the Stat. 7 & 8 W. 3. c. 37. made for the encouragement of charitable gifts and dispositions, the king alone, his heirs and successors, may grant to any person or persons, bodies politic or corporate, their heirs and successors, licence to alien in Mortmain, (a)

(a) Mortmain; where lands are given to a house of religion, or to other company incorporated by the king's grant, the land is come into Mortmain, i. e. a dead hand. Terms of the law, p. 466.

and

and also to purchase, acquire, take and hold in Mortmain, in perpetuity or otherwise, any lands, tenements, rents or hereditaments whatsoever, of whomsoever the same shall be holden.

And such lands, tenements, &c. so aliened or acquired and licensed, shall not be subject to any forfeiture, by reason of such alienation or acquisition. Same statute.

A Lease for term of life must be executed by *Livery and Seisin*, (a) because the freehold passeth with that lease, which it cannot do without *Livery and Seisin*.

This was the case of *Allen and Waller* at the *Lent* assizes at *Maidstone* 1654. *Waller* brought an *Ejectione Firme* against *Allen*; the defendant proved a lease parol at a certain rent during his life: Which last word of the defendant's witness gave the verdict against him, because none can be tenant for life without *Livery and Seisin*.

(a) *Livery of seisin* is a delivery of possession of lands, tenements, or other corporate things, unto one that hath a right thereunto; being a ceremony used in the conveyance of lands or tenements, &c. where an estate of fee-simple, fee-tail or of freehold in houses and lands passeth; but not in grants of rents, advowsons, &c. or any thing which lies in grant.—*Livery of seisin*, is a testimonial of the willing departing of him who makes the livery from the things whereof *livery* is made; and the receiving of the *livery* is a willing acceptance, by the other party, of all that whereof the other hath divested himself. For the manner of delivery of seisin, vide 2 *Lilly's Pract. Reg.* 223.

Also

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Also if a man make a lease to one for years, the remainder to another for life, or in tail, or in fee, here the lessor ought to make *Livery* and *Seisin* to the lessee for years, or else nothing shall pass to him in remainder, though the lessee enter and enjoy his term of years; but the freehold and the reversion remains in the lessor. But if the lessor make *Livery* and *Seisin* to the lessee, then the freehold passes over to them in the reversion, according to the grant. For the manner of *Livery* and *Seisin*, see *Pract. Reg.* last published, 397.

That *Livery* must pass a present freehold, and cannot commence *in futuro*. See *Hob.* 171. For the *Livery* must have some estate immediately to operate on.

How a corporation may make *Livery* of *Seisin*: A corporation cannot make *Livery* and *Seisin* to pass away the freehold lands belonging to corporation, but they may make a letter of attorney to another, under their common seal, to make *Livery* and *Seisin* for the corporation; for *Livery* and *Seisin* must be made by *one act*, and not by a *multitude*; and a corporation can do no *acts* but under their common seal.

If a tenant for years of lands consent, that *Livery* and *Seisin* shall be made unto him that hath purchased the reversion of those lands let unto him, and it be made accordingly, this is a good *Livery* and *Seisin* to make the reversion pass, although the tenant for years do not go off from the land at the time when the *Livery* and *Seisin* was made. *Ibid.* See after.

Likewise if a man make a lease of lands or tenements to another for term of years, and the lessor die before the lessee enter into the tenements; nevertheless

nevertheless he may enter, notwithstanding the death of the lessor, because the lessee hath right to the tenements by virtue of his lease, immediately after the sealing and delivery of it. *Vide* Chap. II. p. For he has the *interesse termini*, and has a right to enter when he pleases; for his right has its existence from the lease.

Tenant at Will.

Tenant at will is where a man demises lands to another to hold to the lessee at the will of the lessor, *vel e contra*, and by virtue of this lease the lessee is in possession; here the lessee is tenant at will, and hath no certain estate in the tenements he holdeth, but the lessor may eject him when he pleases: neither can the lessor force him to stay longer than he pleases. *Co. Lit. 55. a.* In all cases of tenancy at will, the will is reciprocal, *i. e.* it is determinable at the election of either party.

But if the tenant at will sow the land, and the lessor eject him out afterwards before the corn be ripe, the lessee shall nevertheless have his crop, and shall have free egress and regress to cut and carry it away, because he knew not when the lessor would enter upon him; but he must cut and carry it off in convenient time, for else it will be liable to distress, or in some cases to execution.

It is said, that if one be in possession of the lands of another, and hath usually paid a rent unto him for these lands, although it cannot be expressly proved that the lands were demised at will to him that is thus in possession of the lands, *viz.* That he should hold them as long as both parties

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parties should please; yet if the payment of a quarter or half a year's rent can be proved, this will be a good evidence of a lease at will. *Pract. Reg.* (the fourth edition) 403.

Words spoken off from the land by the *lessor* will not determine the will, until the *lessee* hath notice thereof: But an actual entry in the absence of the *lessee* will determine it; and the *lessor* may come upon the land, and forbid the *lessee* to hold any longer; or he may enter thereupon, in the presence of witnesses, and say, *I do hereby enter and take possession of this my land, &c.* and so oust the tenant at will. *1 Inst.* 56, 57.

If a tenant for years sow his land so near the end of his term, that his lease expire before the corn be ripe, he shall not come to reap it; but the lessor or other who hath the reversion, shall have the crop, because the *lessee* knew certainly the end and determination of his term and lease, and it was his own folly to sow the ground under such circumstances.

In like manner if a house be let to a man to hold at will, and the *lessee* enters the house, and bringeth in thither his goods and household-stuff, and afterwards the lessor ejects him out; here he shall have liberty of egress and regress to fetch away his household-stuff, utensils, &c. and if such tenant die, the like liberty is given to his executors, &c. *Lit. Tem.* p. 13.

By *Holt* chief justice, Tenant at will, rendering rent quarterly, the lessor may determine his will when he pleases; but then he will lose all his rent which will be due for the quarter in which he determines his will. So the *lessee* at will, may determine his will when he pleases, but then he shall

shall pay the rent for all the quarter in which he determines the will. But if *A* makes a lease to *B*. for a year, and so from year to year, *quamdiu ambabus partibus placuerit*, *A*. may determine his will at the end of any year; but if any new year be begun, it cannot be determined before the end of the year. 1 *Lord Raym.* 707, 708. 2 *Salk.* 413. 3 *Salk.* 222. 2 *Lord Raym.* 1008. *Leighton v Theed*.

Tenant at will *de anno in annum quamdiu ambabus partibus placuerit*, after the commencement of the year, cannot determine his will to the prejudice of the lessor for his rent. *Jones* 5. 2 *Kebl.* 260. pl. 10.

If tenant at will, rendering rent quarterly, begins a new quarter, and voluntarily determines the will before the quarter ended, yet he shall pay the rent for that quarter. *Allyn* 4.

If one seised in fee-simple, fee-tail, or for term of life, in an house, and hath goods in that house, and makes his will, appointing his executors, and dies; now to whomsoever the house descends, the executors shall have liberty, in some reasonable time, to enter and carry away the goods.

And if a man by deed of feoffment grants certain lands to another, and delivers him the deed, but executes it not by livery and seisin, the feoffee in this case may enter on that land, and hold it at the will of the feoffor; but the feoffor may eject him out again when he will.

If a man dwell in a house as tenant at will, he is not bound to repair the said house, as a tenant for term of years is bound to do.

But if a tenant at will shall commit voluntary waste, as to pull down houses; cut, grub, sell or destroy

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destroy trees, the lessor may bring his action of trespass against him for so doing; and though a tenant at will is punishable for *permissive waste*, yet he shall answer for voluntary waste; for his committing waste is in the implication of law a determination of the will; and as in the case of a licence to hunt in my grounds, if the person to whom it is given cuts down trees, &c. his entry is looked on as a trespass *ab initio*. *Vide post*, Chap. VI. Also the lessor upon a lease at will, if he hath reserved a yearly rent, may either distrain, or bring an action of debt for the arrears, which he pleases.

Tenant at will made a lease from year to year; it is no disseisin, but it is a void lease, 4 *Leon*, Ca. 95.

It doth not seem improper to observe in this place, that it is held by opinions of the first authority, that there is no such tenure as tenancy at will existing at this day; for it is said that the nature of the tenure depends entirely upon the agreement of the parties, as to the payment of rent; for instance, if payable quarterly it is a tenure for a quarter of a year, and cannot be determined by either party without a quarter's notice, and so for any other time agreed on.

At a meeting of eleven of the judges (among whom were earl *Mansfield* and lord chief justice *De Grey*) and a conference there had (on the motion of Mr. justice *Gould*) what notice was necessary to be given to a lessee at will to quit possession, before a lessor at will could have title to bring an ejectment and recover possession; it was their unanimous opinion, that in all cases of leases at will of farms of land to hold from year

to

to year, and so for as long time as both parties shall please; that before the landlord can have title to bring an ejectment against the tenant at will, he must give the tenant six months notice to quit possession of the farm; and they hold the like law as to houses let at will, unless there be some usage or custom of the place or district where the house is situate, to give a quarter or other kind of notice to quit.

*It must
be a
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notice
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These opinions have carried this matter much further, for it was lately determined, that where *A.* leased a *messuage* to *B.* for years, and *B.* let *C.* into possession not only without the privity or consent of *A.* but expressly against it, and *B.* left the premises, upon *A.*'s bringing an ejectment against *C.* that *A.* could not recover possession for want of notice to quit being given by *A.* to *C.* though *A.* by such notice would have given *C.* a colourable title to his tortious entry, which *A.* avoided to do, as not looking upon *C.* as his tenant, or himself as his landlord, between whom only notice of quitting is necessary; otherwise a landlord cannot possibly eject a person in possession of his premises, though he comes in without any sort of right.

However, notwithstanding the above modern doctrine on the subject, the reader may be assured, that whenever this matter comes under the judicial cognizance of the supreme judicature of the kingdom; it will be determined by the old common law, and not by modern opinions or precedents.

These opinions put me in mind of what the learned doctor *Blackstone* hath said on a similar occasion, which I beg leave to transcribe, being
extreamly

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extreamly applicable to our purpose; his words are :

“ The common law of *England* hath fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new dress and refine, with all the rage of modern improvement.”

Indeed I do not know by what authority a judge can say, that there is no such tenant as a tenant at will, any more than he can say, that no toll can be gathered by law ; for the one exists as much by the common law, as the other does by statute law.

Tenant at Sufferance.

Tenant at sufferance is he who comes in by lawful lease, and keepeth possession after his lease is expired, and wrongfully holdeth over : As tenant for life of *J. S.* who holdeth over after the death of *J. S.* *Co. Lit. f. 57. b. Kitch. f. 238.* Every tenant at *sufferance* is made by the laches of his lessor. *2 Leon. 143.*

The lessor cannot have an action of trespass against a tenant at sufferance before his own entry into the premisses. *Co. Lit. 57. b. 5 Mod. 384.*

Also if one leases at will and dies, and the lessee continues in possession, though the lease be determined by the death of the lessor, yet the lessee is tenant at sufferance. *Co. Lit 57. b.*

But if the king's lessee for years or life holds over his term, yet he is not tenant at sufferance, but an intruder ; for no laches of entry may be imputed to the king. *Ibid.*

And if a guardian, after full age of the heir, continues in possession, yet he is not tenant at sufferance,

sufferance, but an abator, for his estate is created by act in law. *Ib.* And as the law gives him that estate, it facilitates the heir's remedy for his wrong.

If the husband leases for years the lands of his wife, rendering rent, and then the wife dies, the husband shall not have debt for the rent incurred after, for his estate is gone; and it seems the lessee is become tenant at sufferance. *1 Roll. Abr. 591. B. 4.*

If one covenants to permit and suffer another to have, hold and occupy certain lands, *à die datus*, for life; this is but a covenant, and no lease, and so the law expects no livery thereupon; and therefore he shall not be tenant at will, but only by sufferance. *1 Roll. Abr. 859. T. 10.*

Also if *A.* bargains and sells lands to *B.* by way of mortgage, on condition to pay several sums yearly for certain years; and there is a covenant in the deed, that *B.* shall not take any profits of the land, till default in some of the payments; this a new lease at will; for it is not that *A.* shall take the profits, but only that *B.* shall not take them, which sounds in covenant, and so *B.* is tenant at sufferance only, and not tenant at will. *Ibid. 12.*

See what is said at the end of "*Tenant at Will.*"

Tenant by Copy of Court-Roll.

This is a very antient tenure, and depends only upon custom; and there are so many and various kinds of customs in copyholds in several manors and countries, that it would take up a large volume to discourse of them all, which is not now our present

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present intention; but we shall refer that subject to a farther opportunity, and here shortly in general terms set forth the nature of a tenant by copy of court-roll. In a manor wherein there is a custom, and hath been so used time out of mind, (for nothing can be a custom, unless it be *tempore cujus non extat memoria*, time out of mind) that certain tenants within the said manor have used to have lands or tenements, to hold to them and their heirs in fee-simple or fee-tail, or for term of life, or upon any other condition, at the will of the lord after the custom of the same manor, such tenants are called *copyholders*; that is, tenants by copy of court-roll (not tenants by court-roll): For a copy of the court-roll is all the evidence they have for their estates in the said lands. *Lit.*

Ten. l. 1. c. 9.

Now a tenant by copy of court-roll may not alien his estate by deed; for if he do, it is a forfeiture to the lord, and the lord may enter and take the forfeiture. *Ibid. & Co. Lit. 59.*

But if any tenant by copy of court-roll will alien his lands, he may do it by a surrender into the hands of the lord, to the use of him that shall have it; and any kind of estate that a freeholder can make of his land by deed, a *copyholder* may do the same by surrender, if the custom will support it. *Lit. & Co. Lit. ut supra.*

The tenant by copy of court-roll is also bound by the custom to repair his houses; and if he suffer any tenement or house to fall down for want of repair, or if he pull it down, he forfeits his copyhold to the lord of the manor.

The tenant is as well inheritable as he that hath frank-tenement by the common law, if he observe the

the custom of the manor, and perform and pay his services. 4 Co. Rep. 21, 22, &c.

There are seven properties incident for maintenance of a good custom.

First, it must be reasonable.

Secondly, It must be certain.

Thirdly, it must be according to common right.

Fourthly, it must be on good consideration.

Fifthly, it must be compulsory.

Sixthly, it must be without prejudice to the king.

Seventhly, it must be to his profit that claimeth the same.

In Customs, there is User, Non-User, Abuser, and Interuser.

User, Is when, according to time and occasion, a custom is used.

Non-User, Is when, for want of time and occasion, or through negligence or forgetfulness, a custom is not used.

Abuser, Is when a custom is ill used; for as user doth nourish a custom, so doth abuser destroy a custom.

Interuser, Is in some cases, where a custom may be used in one sort, and sometimes in another, and yet a good custom, if there be good considerations for the exchanging thereof at times.

If the lord have used, at the admission of his copyhold tenants, sometimes to take for a fine two pence, or sometimes four pence for an acre, sometimes

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sometimes twelve pence an acre; this *user* is so uncertain, that it makes the fine arbitrary at the lord's will.

Custom to pay a fine according to yearly value, good. *Pract. Reg.* 174.

If the lord of the manor have used, time out of mind, to admit his copyhold tenants without fine, this usage shall bind the lord as well as a fine certain.

If the lord have used to have certain work-days of his tenants, and that hath not been used by the space of twenty years last past, yet this *non-user* is no discharge to the tenants, so that there be any alive that can remember the same.

If the tenants have used, when they sow their lands, to pay the lord rent-corn, and when it lieth in pasture, to pay their rents in money, this is a good *interuser*.

If the tenants have used to pay their lord every fourth year a double rent, and every sixth year an half rent, this is a good *interuser*.

If the tenants have used to have common of pasture in their lord's woods for their horse-cattle, and they put in their neat-cattle, and destroy the woods, this is an abuser: But it is but finable, and no forfeiture of the common, no more than if they have a common for a certain number of beasts in the lord's soil, and they exceed the number; this abuse by the surcharging is only finable, and no forfeiture.

If a man have a fair to be used two days, and he keeps it three days, this abuse is a forfeiture.

Every good custom is grounded upon good reason, and that shall be said in reason a good custom, that in reason is a good law; for law and custom

custom be of that affinity, as both do allow like reason, and both do forbid like inconveniencies; and the final effect of both is, to discuss and to discern every man's true right, and to give to every man that which is his own; for although custom in some cases differs from law, and doth admit execution of some acts without some ceremonies required by the law, yet the end and effect of custom is to maintain the like reason, and avoid the like inconveniencies, as the law doth.

If the tenants of the manor will prescribe to hold without paying any rents or services for their copyholds, this is no good custom: But to prescribe to hold by fealty for all manner of services is good and reasonable, for there can be no tenure without some kind of service.

If a lord will prescribe never to hold a court but when it pleaseth himself, this is not good, because it plainly tends to a defect of justice: But to prescribe never to hold a court for the special good of any one tenant, except the same tenant will pay him a fine for the same, that is good and reasonable; for general courts are held for the general good of the district within the bounds of the manor; and if every particular tenant had a right to demand a particular court it would be endless, and chargeable to the lord.

If a copyholder surrender his land to the use of a stranger, in consideration that the same stranger shall marry his daughter before such a day, if the marriage succeeds not, the stranger takes no benefit by the surrender. But if the surrender be in consideration that the surrenderee shall pay *such a sum* of money at such a day, though the money
be

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be not paid, yet the Surrender standeth good; because in the last case the Surrenderor has clearly a remedy for the money, and in the former he may not be able to compel the stranger to marry his daughter. Many customs there are, which at the beginning were voluntary, and now, by continuance, are grown compulsory: *Quæ initio fuerunt voluntatis, ex post facto fuerunt necessitatis*, saith the civil law; which also in many cases doth agree with the common-law.

Wilful denying of services is a forfeiture. *Lit. Rep.* 295.

And if a copyholder convert part of his land into a fishery, it is a forfeiture. *Lit. Rep.* 268.

But if tenant for life of a copyhold suffers a recovery as tenant in fee-simple, this is no forfeiture. *1 Mod. Rep.* 199. If a fold-course is not due of common right, but of custom, and there is disturbance for it, it is no forfeiture. *Lit. Rep.* 267.

And of all forfeitures committed by copyholders, the lord only is to take advantage.

Also if he in remainder entereth upon a tenant for life of a copyhold, and maketh a surrender, nothing passeth. *Mod. Rep.* 199.

Note; An admittance of tenant for years is an admittance of him in remainder. *1 Vent.* 269. *Mod. Rep.* 102, 120. *4 Co.* 23. *3 Cro.* 504.

Custom for copyholders to have sole feeding in a certain waste; it is not needful to alledge that the beasts were levant and couchant. *Vide 2 Lev.* 2, 67. Where also it is said, copyholders may license others, (without deed) to put in their beasts, and may exclude their lord. *1 Yarr.* 165. *2 Saund.* 326, 327. But if a man claim only

common appurtenant, or part of the herbage, he must not say for his cattle levant and couchant; and *fol. 338.* says, the licence ought to be by deed.

Lands do not appear to be copyhold, by saying, they were held according to custom, unless it be said at the will of the lord. *Idem. 144.*

In what cases, and when the lord shall seize the copyhold estate of his tenant for felony or treason. See 2 *Vent. 38.* 1 *Lev. 263.*

A remainder limited to one for the life of a tenant for life, may be good by way of remainder, because a tenant for life may forfeit by alienating in fee, and then he in remainder may enter and enjoy; but this reason holds not in copyholds; for if a tenant for life of a copyhold commits a forfeiture of his estate, the lord of the manor shall take advantage of the forfeiture, and not he that had the remainder or reversion. 1 *Saund. 151.*

Also a lord may grant copyhold forfeited before seizure. 1 *Lev. 26.* But *Strode* vers. *Dennison*, 3 *Lev. 94.* Copyholder for life was attainted of felony, and adjudged, That he in reversion might take advantage and enter; for the estate for life was determined by the attainder, although it appeared the felony was pardoned. See after, *Copyholder convicted.*

No forfeiture of a *Felo de se* happens before an inquisition is taken and returned. *Sand. 278, 362.*

The husband takes copyhold lands of the lord, to whom the lord grants the seisin to hold to the husband and wife, it is a good grant to the wife, although she is not named until after the *Ha-Lendum.* 1 *Saund. 151.*

A lord

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A lord, without a custom, may seise the lands until the tenant comes in to be admitted, but cannot seise them as forfeited without a custom.

1 *Lev.* 63.

If he in remainder of a copyhold surrenders his remainder for the use of the tenant for life, and after his decease to the use of himself and his wife, the estate limited to the tenant for life is void; but the estate limited to the husband and the wife good by way of a present estate, but not by way of remainder. 1 *Saund.* 150, 151, 152.

But a surrender of a copyhold in fee, from the time of his death, is void. *Idem* 151. But custom to surrender to the use of his will, is good.

A copyholder convicted of felony, had clergy allowed before attainder; and the court was of opinion, that it was no forfeiture without a special custom. 1 *Lev.* 263.

If a covenant or agreement be to surrender a copyhold to the use of *A.* then a surrender into the hands of two copyholders, according to the custom, is sufficient. 1 *Lev.* 293.

A copyhold estate cannot be surrendered to another by attorney without deed; but one may be admitted to a copyhold estate without deed. *Pract. Reg.* 170.

Admittance to a particular estate is admittance to the remainder; and no fine ought to be paid for admittance to a remainder without special custom: and a refusal to pay a fine upon a reasonable doubt of the custom is not forfeiture. 3 *Lev.* 308.

Copyhold land of the tenure of *Borough-English*, surrendered to the use of another person and

his heirs, who dies before admittance, the right shall descend to the youngest son, because the admittance has reference to the surrender, and they both make but one act. 1 *Mod. Rep.* 102. 3 *Keb.* 263. 4 *Co.* 22. b.

If a copyholder for life surrender to the use of another, who is admitted, by this the first copyholder's estate is clearly determined; but if copyholder in fee surrenders to the use of another for life, after his death he shall have it again. *King and Lord's case. Hill.* 5 *Car.* 1. *B. R. Rot.* 793. *Cro.* 1. *Par.* 148. because in the first case he grants his whole interest, in the other only part of it.

If an infant surrender copyhold land to another, who is admitted, this is not good to bar the infant, for he may enter at his full age. *Goole and Crane's case, Moor's Rep.*

If a woman copyholder take an husband who surrenders, this shall be no discontinuance to the wife, nor her heirs. 35 *Eliz. Bullock and Dibley's case, 4 Co. Rep.* 23.

The lord of a manor seised a copyhold without cause, and granted it to another in fee; the grantee died, and his heir was admitted: Then the first copyholder died, and his heir entered upon the heir of the grantee, and surrendered to the use of a stranger; and here the heir's entry before admission was adjudged lawful, and his surrender to the use of a stranger good; and it was resolved, that the descent of a copyholder doth not toll or take away the entry of another copyholder who hath right. 2 *Cro. Par.* 36. and *vide 4 Co. Rep. fol.* 23.

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If a copyholder for life cut down trees, the lord may carry them away. *Pract. Reg.* 170.

If a copyholder commit waste, whereby a forfeiture accrue to the lord, who afterwards accepteth of rent, this doth not bar the lord, but he may enter for the forfeiture of the tenant, notwithstanding the acceptance of the rent. *Mich. 29. El. in B. R. Godb. 47. Quere*, Whether the rent accrued after the forfeiture committed, and the lord's knowledge of it?

If a copyholder forfeit his estate, and then surrenders to the lord, who accepts it, not knowing of the forfeiture, yet this is no dispensation of the forfeiture. *Hill. 4 Car. 1. Rot. 496. B. R. Matthews and Whiston's case, 1 Cro. Par. 169.*

A copyholder in fee took a lease for years of a manor: Resolved the copyhold was extinct forever, and not only during the lease. *Hyde and Newport's case, Moor's Rep.*

If a feme copyholder in fee take an husband, who makes a lease for years contrary to the custom, after the husband's death this forfeiture shall not bind the feme and her heirs, but she shall have it again after her husband's death *non obstante* the forfeiture; and so it was adjudged *inter Savern and Smith* in the exchequer. *Cro. Rep. 1. Par. 7. Pasch. 1 Car. 1.*

A copyholder in fee surrendered to the lord of the manor his copyhold estate, and the lord made a lease for years of the manor and of the copyhold, by the name of his tenement called *H.* and whether by this the copyhold was determined or no, was the question: And it was held that it was not; because, when the lord let the manor, it was included.

included as a parcel thereof; but if he had made a lease for years of the copyhold by itself, that had destroyed the copyhold; for it was then during that time severed from the manor, and so could never again be demisable by copy. *M. 14 Car. 1. in B. R. Lee and Boothley's case. Cro. 1 Par. fol. 375.*

If a copyholder makes a lease for years, which is a forfeiture at the common law, and after the lord makes a feoffment, or a lease for years of the freehold of this copyhold, in this case the feoffee or lessee of the lord shall not take advantage of the forfeiture; for the lease of the freehold made by the lord before entry, is an assent that the lessee of the copyholder shall continue his estate; and so it is in nature of an affirmance and confirmation of the lease. *M. 20 Eliz. in C. B. Penn and Merical's case. Owen's Rep. fol. 63.*

Every one who hath a lawful estate or interest in a manor, be it in fee-simple, fee-tail, dower, tenant by the curtesy, tenant for life, tenant for years, guardian, tenant by statute-merchant, staple or *elegit*, tenant at will and sufferance; if a copyhold escheat or come into their hands during the time, they may regrant it, and it shall bind the lord, because every one of them is *dominus pro tempore*. *Co. Lit. 58. Co. 4 Rep. 28, 29.*

If a copyholder accept of a lease for years of his copyhold, by this his copyhold estate is determined. *29 Eliz. Lane's case. Co. 2 Rep. 16.* because he has himself consented to an alteration of the tenure.

If the fine of copyholders of a manor upon admittance be incertain, yet the lord cannot demand or exact unreasonable or excessive fines; and if he do,

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do, the copyholder may by the law deny to pay them, and it is no forfeiture; and it shall be determined before the judges, upon proof of the value of the land, what fine was reasonable to be demanded; for if it should be otherwise, great part of the copyholds would be destroyed at the will of the lord, by exacting unreasonable fines. *Co. 4 Rep. 27. Latch's Rep. f. 14. acc.*

If the lord assesses a reasonable fine, and requires the copyholder to pay it, he is not bound to pay it presently, because he could not know what the lord will assess, & *nemo tenetur divinare*, and he shall therefore have reasonable time to pay it in, if the lord limits no time; but it is otherwise of a fine certain, for of that he is bound to take notice. *Co. 4 Rep. f. 27.*

Note, That no fine is due to the lord either upon surrender or descent, until admittance, for that is the cause of the fine, and if after the tenant deny to pay it, (if it be a reasonable fine) it is a forfeiture of the copyhold. *Bacon and Flatman's case*, and *Sand's case*, so resolved. *Vide Co. Rep. f. 28.*

If a copyholder come not to do his services, although he were often demanded to do them, but still puts off from time to time to do them, although he do not absolutely refuse, yet his deferring is a forfeiture. *Pasch, 2 Car. 1. in B. R. Johnson's case. Latch's Rep. f. 14.*

The lord of the manor assessed two years and half value of the land, according to the rack'd rent, for a fine upon the grant of a copyhold, and for non-payment thereof entered for a forfeiture: And it was held by the court of King's Bench, that the fine was unreasonable, and that one year.

and an half of improved rent was high enough; and therefore the lord's entry for the forfeiture was adjudged unlawful. *Hil. 5 Car. 1. in B. R. Dowe and Golding's case, Cro. 1 Par. 142. L. L. ibid.*

The lord assessed a fine of twelve pounds to be paid by a copyholder, and appoints it to be paid at his capital messuage of the manor three months after, and the copyholder pretending the fine to be certain, (that is to say, two years quit-rent) offered the same at the day of assessing the other fine; but at the appointed place for the payment thereof cometh not thither to excuse his nonpayment, nor make any other refusal; and it was held to be a forfeiture of his copyhold: But if he had come at the day assigned him for the payment, and had then tendered the two years quit-rent, being the fine certain according to custom, though not assessed nor demanded by the lord, it had not been a forfeiture. *2 Cro. 617. Latch's Rep. 122.*

It was adjudged, that copyhold lands were within the statute of 21 Jac. 1. c. 16. for limitation of entries within twenty years. *Pract. Reg. 170.* But see the late act 4 & 5 Ann. to commence an action within a year upon such entry or claim. But that copyhold is not within the statute of 12 Car. 2. touching guardians. *Idem 171. Vide 3 Lev. 395. 2 Lutw. Ent. 1139, 1140.*

The statute of *Westminster 2. [13 Edw. 1. Stat. 1.] c. 18.* (which gives the *Elegit*) extends not to copyholds, for if it did, the lord would have a tenant brought in upon him, without either his admittance or even consent. *Gilb. Ten. 160,*

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160, 185, 242. Sav. 67. Rol. Abr. 888. Gro. Car. 44. Hardr. 433. Old. Bindl. 163. 3 Rep. 9. 6 Vin. Abr. 169. pl. 4. 3 Read Stat. Law. 123. 2 Inst. 396. Co. Copyb. 149.

Copyholds are very seldom granted for years, but if they be so granted the executor of the termor must be admitted; and the lord is intitled to a fine upon such admittance. Bur. Rep. 206, &c.

Tenants by the Verge,

Are after the same nature as tenants by copy of court-roll; but they are so called, for that when they will surrender their tenements into the lord's hands unto the use of another, they have a little rod, which, by custom of the manor, they deliver unto the steward or bailiff; and he, that takes the lands, receives the rod in court from the steward in the name of *Seisin*, and therefore they are called *Tenants by the Verge*: Yet they have no other evidence but copy of the court-roll. Lit. Ten. l. 1. c. 10.

One had cut down timber upon a copyhold tenement, which was presented at a court-baron, and found to be waste, and consequently a forfeiture; whereupon the defendant was admitted, brought his ejectment, and had a verdict. The plaintiff brought her bill in equity to be relieved: And it being not proved that the plaintiff had sold any of the timber, and that the premises were much out of repair, an issue was directed to try if the waste was wilful; which being found for the plaintiff, it was decreed she should be relieved: And that the defendant should deliver her the possession again, and account for the mesne profits:

sits: But the lord chancellor said, in case it had appeared wilful waste, she should not have been relieved, *Mary Thomas, widow v. Potter & al'*. Hil. 19 Car. 2. *Chancery cases*, 1 Par. f. 98.

Copyholder before marriage agreed to settle his copyhold tenement on his intended wife; the marriage took effect, and the husband surrendered the said copyhold to a stranger for a sum of money by way of mortgage; he afterwards surrendered the premises to the use of his wife for life, which surrender was not presented at the next court; but the widow, however, procured herself to be admitted; and it was decreed by the court of chancery, that the wife being in, pursuant to a marriage-agreement, her estate should not be impeached; but had it been a meer voluntary settlement, it would have been otherwise. *Merlin v. Secmore in Cane. Trin. 22 Car. 2. Chancery Cases*, 1 Part, p. 170.

A copyholder having agreed for a valuable consideration to surrender his land, is but in the nature of a trustee for the vendee. *Ibid.* p. 171.

Where a copyholder in fee surrenders to the use of another for life, and the lessee dies, he shall not pay a fine for re-admittance to the reversion; for it continued always in him. 9 Co. *Mary Podger's case*, 107.

And if such copyholder in fee surrenders to the use of one for life, remainder to a third person in fee, but one fine is due; for the particular estates and the remainders are but one estate. *Mich. 38 & 39 Eliz. B. R. by Popbam.*

If a copyholder incur a forfeiture by committing waste, and the lord afterwards accept the rent; he may enter for the forfeiture notwithstanding;

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ing; for the copyhold was in him immediately by the forfeiture. *Mich. 29. Eliz. B. R. Godb. 47.*

Tenants in Coparcenary.

There be two kinds of tenants in *coparcenary*, that is, parceners at the common law, and parceners by custom.

After the course of the common law, when a man or woman is seised in lands or tenements in fee-simple, or fee-tail, and hath no other issue but daughters, and dieth, the tenements descend to the daughters equally as coheirs, and they shall enjoy every one an equal part thereof as tenants in parcenary or copartnership, and are all as it were one heir to their ancestors: And these coheirs or *parceners* may have a writ, called *Breve de Partitione facienda*, to have the lands equally divided and shared amongst them.

If a man seised of lands die without issue, and the tenements descend to his *sisters*; or if he hath no *sisters*, and it descends to his aunts; they be *coheirs* or *parceners*, as aforesaid.

If there be two *parceners*, one marries and hath issue and dieth, and afterwards her husband holdeth one half, as tenant by the curtesy, the coheir or parcener that surviveth, and the tenant by the curtesy, may make partition between them; and if the tenant by the curtesy will not consent thereunto, the surviving parcener may compel him by a writ *de partitione facienda*.

But if the tenant by the curtesy desires to have partition, and the parcener surviving will not agree to it, the tenant by the curtesy can have no remedy; for he cannot have a writ *de partitione facienda*.

facienda against the surviving parcener, although the parcener may have it against him. See the late acts concerning partition.

See the Stat. 8 & 9 W. 3. c. 31. concerning partition of lands in coparcenary, jointenancy and tenancy in common.

By the Stat. 7 Ann. c. 18. Coparceners, joint-tenants and tenants in common, having made partition to present by turns, each shall be seised in law of his or her separate estate of the advowson, if it be an estate of inheritance.

Parteners by Custom.

This tenure is gavelkind, and is only used in Kent, except in some certain places in England besides, and in North-Wales. But the men of Kent only claim this as a right remaining unto them unconquered; and it is thus: If a man be seised in fee-simple or fee-tail, in lands or tenements of the custom and tenure of gavelkind, and hath issue divers sons and dieth, all the sons shall be coheirs, and equally inherit those lands and tenements as females do, and may make partition by writ *de partitione facienda*, and divide, as in the case of daughters at the common-law.

Grant of Borough-English lands to one and his heirs for three lives, the youngest son shall be heir. 2 Lev. 138.

Otherwise in gavelkind, of rent granted out of it, it should go against all as the land should. Idem 89.

A rent *de novo*, granted out of gavelkind land, shall descend according to the descent of the land. 1 Mod. Rep. 86, 96.

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Joint-tenants. (a).

When a man, being seised of certain lands and tenements, doth thereof enfeoffe three or four, or more, to have and to hold to them and their heirs, or to hold to themselves for the term of their lives, or for another's life, and they become seised by virtue of that feoffment, these are said to be joint-tenants.

Likewise if two or more disseise another of any lands or tenements to their own use, the disseisors be joint-tenants; but if it be but to the use of one of them, they be not joint-tenants.

Now the nature of joint-tenants is, that the whole estate shall go to the survivor.

As if there be three joint-tenants in fee-simple, and the one of them hath issue, and dieth, the two that survive shall have the whole tenements, and nothing thereof shall go to the issue of him that is dead: And if the second tenant have issue and die, the third, who is survivor, shall enjoy the

(a) Joint-tenants and tenants in common of any inheritance, are compellable to make partition by writ of partition, as coparceners are compellable to do at common law. *Stat. 31 H. 8. c. 1.*

And by *Stat. 32 H. 8. c. 32.* Joint-tenants and tenants in common for lives or years, are compellable to make partition.

By the 8 & 9 W. 3. c. 31. an easier method of obtaining partition of lands in coparcenary, joint-tenancy, and tenancy in common, is provided.

But these statutes do not concern copyholds.

whole,

whole, and shall have it in fee-simple to him and his heirs.

But now there is a difference in tenants in parcenary : for if there be three *copartners*, and one hath issue, and dieth before there be any partition made, that part which belonged to her that is deceased shall descend to her issue ; and if such a parcener die without issue, her part shall descend to her *coheirs* : So that this they have by descent, and not by survivorship, as joint-tenants have.

And as the survivorship taketh place among joint-tenants, so it doth among all persons who have joint estate or possession with others in chattels real or personal.

As if a lease be made to several persons for term of years, the survivor of the lessees shall enjoy all the tenements during the term by virtue of the lease.

And in like manner, goods and chattels personal, whereof there be partners, shall go to the survivor. And if a bond be made to many persons for one debt, and some of the obligees die, the survivor shall have all the debt. And so it is in all covenants and contracts amongst partners.

There may also be joint-tenants for term of life, and yet they have several inheritances : As,

If lands be given to two men to hold to them for term of their lives, and to the heirs of their two bodies, here these *donees* are joint-tenants for term of their lives, and have several inheritances : For if one of them have issue and die, the survivor shall enjoy the whole during his life by survivorship. And if the survivor have also issue and die, then

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then the issue of them both shall enjoy the estate equally between them, as joint-tenants.

Now the reason why these are said to have several inheritances is, because it is impossible for them to have an heir between them, as a man and a woman may have.

Therefore the law maketh this distinction according to reason and the form of the gift; that is to the heirs that one getteth on the body of his wife; and so likewise of the other: So that by this reason it must of necessity be, that they have several inheritances.

And if after the death of the *donees*, the issue of one of the *donees* die also, leaving no issue of his body surviving, in this case the *donor* or his heirs may enter into the moiety of the lands, as in his reversion, though the other of the *donees* hath issue living.

In like manner, if lands be given to two females, and to the heirs of one of them, in this case the one of them, that is, she that hath it but for life, hath a freehold; and the other hath a fee-simple: And if she that hath a fee die, the other who hath the freehold shall enjoy the whole during her life, by virtue of her survivorship.

And if tenements be given to two, and to the heirs to be ingendered of the body of one of them; here the one hath a freehold, and the other fee-tail.

If there be two joint-tenants, and they be seised of an estate in fee-simple, and the one by deed grants a rent-charge to another out of that part which appertains to him, now, during the life of the grantor, this rent-charge is good and effectual, but it becomes void after the death of the grantor;

grantor; for the tenant that surviveth shall hold all the land by survivorship, discharged from the rent-charge of the other.

If there be two joint-tenants for life, and one lets his part for years, rendering rent, and dies, the term shall continue against the survivor, but the rent is gone. *Fineb, lib. 1. c. 3. p. 13. Dyer 187.*

But amongst *coheirs* or *parceners* it is otherwise; for if there be two parceners in tenements in fee-simple, and before partition one chargeth his part by his deed with a rent-charge, and dieth, leaving no issue, whereby his moiety descends to the other partner; here that part shall not be freed of the rent-charge, because he cometh to this moiety by descent as heir by law.

If joint-tenants be desirous to make partition between them, they may do it by consent and agreement amongst themselves; and such partition is good and binding against each other: But unless it be done by mutual consent amongst themselves, the law cannot enforce or compel them, or either of them, to do it; because joint-tenants cannot have a writ *de partitione facienda*, as tenants in copartnership may have. But see the late statute *possea*, p. 45.

If there be a joint estate of lands and tenements made to a man and his wife, and to a third person; here the third person shall have as much as the man and his wife; that is one moiety: For the man and wife can have but half the estate, because they are but one person in law.

In like manner it is, if lands were made to a man and his wife, and two others; here the man

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and wife can have but a third part, and the two others the other two parts.

Tenants in Common.

Such as have lands and tenements by several titles, and not joint titles, and none of them knoweth what is several to him, *i. e.* that they hold the land *pro indiviso*, whether it be in fee-simple, fee-tail, or for term of life; these are said to be tenants in common, because they ought by the law to hold, enjoy and occupy the lands and tenements in common and undivided, and to take profits in common, as coming to the same lands and tenements by several titles, and not by one joint title.

If a man enfeoff two joint-tenants in fee, and one of them *alien*s his part to another in fee, this *alienee* and the other joint tenant are tenants in common, because they now stand seised by several titles; the joint-tenant by virtue of the first feoffment made to him and the other, and the *alienee* by virtue of the feoffment of the other joint-tenant; so that the several feoffments make their titles several, whereby they become tenants in common.

If there be three joint-tenants, and one of them *alien*s his part to another person in fee, here the *alienee* is tenant in common with the other two joint-tenants, and of the other two parts the joint-tenants be seised jointly, and the survivor of them shall have the whole of those two parts by virtue of survivorship.

If there be two joint-tenants in fee, and one of them gives his part to another in tail, here the

the *donee* and the other joint-tenant become tenants in common.

-Also if lands be given to two men, and to the heirs of their two bodies; in this case those *donees* have a joint estate during their lives; and if both of them have issue and die, both their issues shall hold the land as tenants in common.

If lands be given to two men and their heirs, to hold to each a moiety, these are tenants in common.

If a man, being seised in certain lands, doth enfeoff another in the half of it, without limiting of the same half in severalty at the time of the feoffment made, that is, do not distinguish that half from the other by particular bounds and limits, in this case the *feoffor* and the *feoffee* shall hold their parts of those lands in common.

And as it is amongst tenants in common in lands or tenements in fee-simple or fee-tail, in the same nature it also is between tenants for term of life: As if there be two joint-tenants seised in fee, and one of them lets to a man his part for term of his life, and the other joint-tenant lets to another man his part for term of life, these two lessees be tenants in common for the term of their lives.

Likewise, if a man lets lands unto two persons for the term of their lives, and the one of them grants all his estate of the part belonging unto him unto a third person; then the third person, to whom this grant is made, and the other tenant for term of life, be both tenants in common during the lives of both the lessees.

If there be three joint-tenants, and one of them releaseth all his right which he hath in the land

by

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by his deed to one of his fellows, then he to whom the release is made hath the third part of the lands by virtue of that release, and shall hold that third part with himself and his fellow in common, and they two shall hold the other two parts jointly.

Also if a joint estate be made unto a man and his wife, and to a third person, and that third person releaseth his right which he hath in that estate to the husband, then the husband hath the third person's moiety, and the wife hath nothing therein at all.

And if such third person release his right in his moiety to the wife, not naming her husband in the release, then the wife hath the third person's moiety, and the husband hath nothing at all in it, but only *jure uxoris*, in the right of his wife; because the release shall work to invest the estate in the person to whom the release is made, for all that appertained to him that made such release.

If lands be conveyed by lease and release, to the use of all and every the children of J. G. and their heirs, equally to be divided between them; these words "*equally to be divided*" make a tenancy in common 2 *Will. Rep.* 341.

There may be also tenants in common by title of prescription; that is, when two have holden lands in common undivided, the one, one half from his ancestors, and the other, the other half from his ancestors, or from whom the estate is derived unto them undivided, time whereof the memory of man hath not known to the contrary, these are tenants in common, by title of prescription.

Now

Now these tenants in common ought in some cases to have, for the maintenance of their possession, several actions; and in some cases they shall all join in one action: For if there be two tenants in common, and they be disseised, they two cannot bring against the disseisor one assize in both their names, but they must have against him two assizes; for every one of them ought to have an assize of his half, because the tenants in common are seised by several titles.

But amongst joint-tenants it is otherwise; for if there be never so many of them, and they be disseised, they shall have but one assize in all their names, because they have all but one joint title.

It hath been formerly held, that an action on the case lay not for one tenant in common, &c. against another who disposes of the whole. 1 Lev. 29, &c.

But stat. 4 & 5 Ann. c. 16. *f. Actions of accounts may be brought and maintained against the executors and administrators of every guardian, bailiff or receiver, and also by one joint-tenant and tenant in common, his executors and administrators, against the other as bailiff, for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint-tenant, or tenant in common.*

There is likewise a difference in suing real actions between partners that be in by divers descents and tenants in common. For if a man, who is seised of lands in fee, dieth, leaving only two daughters his coheirs, and these two daughters enter, and have each of them a son, and die without making any partition between them, so
that

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that the lands descend equally to their two sons, the one moiety to one of them, and the other to the other, and they enter and enjoy the same in common, and be disseised; they shall not in this case bring two assizes, but one assize in both their names: For though they came in by divers descents, yet they be parceners, and a writ *de partitione facienda* lieth between them. Nevertheless they be not parceners by reason of the seisin and possession which they have from their mothers, but in respect to their estates which descended to their mothers from their grandfather.

And so in respect and consideration of their first descent that was to their mothers, they have a title in parcenary, which maketh them parceners; and they be but as one heir to their common ancestor, their grandfather, from whom the land descended to their mothers. And therefore, before partition made between them, they should have but one assize, though they came in by several descents.

And likewise in personal actions, in trespass, and such like cases which concern their tenements in common, the tenants in common ought to bring such personal actions jointly in all their names; as for breaking their houses, closes or pastures, wasting, treading down, or otherwise spoiling the grass, cutting or selling of their woods, spoiling their fruit-trees, fishing in their ponds, and such like; in these and all such kind of actions wherein they are jointly concerned, the tenants in common shall have one joint action, and recover damages jointly.

Likewise, if two tenants in common make a lease of their two tenements to another for term
of

of years, reserving unto themselves a certain yearly rent, if the rent be in arrear, they shall have one action of debt for the rent against the lessee in both their names, and not divers actions.

If two persons or more have chattels real or personal in common and by divers titles, if one of them die, the other who survives shall not have his part that is dead in those chattels by survivorship, but the executors of him that dieth shall hold and enjoy his part with them that survive, as the testator did or ought to have done in his life-time.

If two persons have an estate in common for term of years, and one of them puts the other out of his possession, and enjoys all himself, then he that is so put out of possession may bring his ejectment against the other for his moiety.

But if two persons be possessed of chattels personal in common by divers titles, as of an horse, or an ox, or a cow, or the like; and one of them takes it into his own possession from the other; the other hath no remedy, but to take this from him that hath done him the injury again, to occupy in common, when he hath an opportunity; that is in plain terms, he may come by it as well as he can. *Vide* the act for amendment of the law, p. 9. this work.

The essential difference between joint-tenants and tenants in common, is, that joint-tenants have the land by one joint title and in one right, and tenants in common by several titles, or by one title and several rights; and this is the reason that joint-tenants have one joint freehold, and tenants in common several freeholds.

There

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There are also tenants in ancient demesne;

Of whose tenures and privileges you may read at large in Mr. *D'Anvers's* general abridgement 657. &c. Tit. *Ancient Demesne*.

There are also several other tenants besides the aforementioned, as tenant by *vilein*, tenant by statute merchant, tenant by statute staple, tenant in mortgage, &c.

Some Observations as to Mortgages.

That where lands are mortgaged thrice over, the third mortgagee may buy in the first incumbrance to protect his own mortgage, and he hath both law and equity for him. 2 *Vent.* 338.

That he shall hold the land against the second mortgagee until he be satisfied both the money he paid the first mortgagee, and also his own which he lent upon the last mortgage. *Ibid.*

But where only part of the lands are mortgaged to the first, and the whole to the second, and after to the third, if the third buys in the first title, it shall protect only that part that is in the first mortgage. *Idem* 339.

That a purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing a precedent incumbrance, it shall protect his estate, though he purchased in the incumbrance after notice of a second mortgage. *Ibid.*

That mortgages are not relievable in chancery after twenty years, for the statute of 21 *Jac.* 1. c. 16. limits the time of entry to that number of years, &c. and equity in that case follows the law. *Ibidem* 340.

That upon a mortgage in fee the redemption-money shall be paid to the executor, and not to the heir. *Idem* 338, 351.

That the court of chancery cannot shorten the time that is given by express covenant and agreement of the parties, but when that time is past, then the practice is to foreclose. *Idem* 365.

But Note; The practice of chancery is now otherwise: For though there be an express covenant in the mortgage deed, if the money be not repaid at the day, the mortgager shall be absolutely foreclosed, &c. yet if it appear that the money lent is not an equitable consideration, the court will not only enlarge the time for payment, but order the mortgagee to reconvey the estate on payment of principal, interests and costs, within six, nine, or perhaps twelve months after the time limited in the deed.

Also, though the covenant or agreement be, That if the money be not repaid at the day, then on payment of a farther sum in certain, the mortgage to be absolute; or though more money do be lent to the mortgager after the mortgage, or even after the forfeiture, yet if there appear to be no hardship on the mortgagee, or that the money so lent is not a sufficient equitable consideration for the estate, the chancery will compel the mortgagee to reconvey on payment of principal, interest, costs and damages.

But by Stat. 4. & 5 W. & M. c. 16. if a man mortgages his lands or estate twice, and does not declare or give notice to the second mortgagee of the former mortgage, or within six months clear it, he loses the equity of redemption to the second mortgagee, and he himself will stand foreclosed.

And

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And *Nath*; The judges at common law may and ought judicially to take notice of mortgages and equities of redemption, and therein guide themselves by rule of equity, rather than by the strict rules of law; for nothing has more contributed to the exorbitant power of chancery than their over-fondness for what they call maxims of law.

By Stat. 7 Geo. 2. c. 20. *sect. 1.* "Where any action shall be brought on any bond for payment of money secured by mortgage, or performance of the covenants therein contained, or where any ejectment shall be brought by any mortgagee, and no suit shall be depending in equity for foreclosing or redeeming such mortgaged lands; if the person having right to redeem, and who shall appear and become defendant, shall pending such action pay unto such mortgagee, or in case of refusal bring into court the principal and interest due on such mortgage, and all such costs as have been expended in any suits of law or equity upon such mortgage (such principal, interest and costs, to be ascertained by the court where such action is depending, or by the proper officer by such court to be appointed) the monies paid to such mortgagee, or brought into such court, shall be in satisfaction of such mortgage, and the court shall discharge such mortgagor or defendant from the same, and shall by rule of court compel such mortgagee, at the costs of such mortgagor, to reconvey such mortgaged lands, and deliver up all writings in his custody relating to the title."

By Sect. 2. "Where any bill shall be filed in equity by any person claiming interest in lands under any mortgage, to compel the defendant

claiming right to redeem, to pay the plaintiff the principal and interest due on such mortgage, or the principal and interest together with any money due on any incumbrance chargeable on the equity of redemption thereof, and in default of payment to foreclose; the court of equity upon application by the defendant having right to redeem, and upon his admitting the title of the plaintiff, shall, at any time before such cause shall be brought to hearing, make such decree therein as such court might have made in case such cause had been regularly brought to hearing."

By Sect. 3. "This act shall not extend to any case, where the persons, against whom redemption shall be prayed, shall (by writing delivered, before the money shall be brought into court, to the attorney or solicitor for the other side) insist, either that the party praying redemption has not right to redeem, or that the premises are chargeable with other sums than what appear on the face of the mortgage; nor to any case where the right of redemption shall be controverted between different defendants; nor shall be any prejudice to subsequent mortgagees or incumbrancers."

CHAP. II.

Of Leases, Covenants, and Conditions; Pro-
vises and Reservations, Surrenders and As-
signments of Leases.

IN all leases, as we have said before in the title
of *tenant for term of years*, there must be lessor
and lessee: He which demises or lets land to farm,
is the lessor; and he who takes the land, that is,
unto whom it is so let or demised, is called the
lessee; in more vulgar terms understood by the
title of *Landlord and Tenant*.

According to our general and common ac-
ception now-a-days, every lessee for life, years,
or at will, though it be but of a cottage, or never
so small a tenement or house, is called a *Firmor*
or farmer, and the premisses a firm or farm; so
we say in the writ, *a firma sua ijscit*, so called,
quia possessio firma, & non precaria, as tenant at
will.

But antiently the chief messuage in a parish or
country town was called, by way of pre-eminen-
cy, a farm; and unto this farm belonged great
demises of all sorts, as gardens, meadows, pas-
tures, rivers, woods, moors, waters, marshes,
furzes, heath, and also messuages, houses, tofts,
mills, and the like: And all those are compre-
hended under the title of lands. These *demises*
were used to be let out to others for term of life,
years or at will. Of leases by parol or word of
mouth, &c. *Vide ante*, p. 12, 13.

These antient farms (or firms, which you will call them; which appellation or dialect differs according to the county: In *Essex*, *Norfolk* and *Suffolk*, they call them *ferms* and *fermors*; but in the West are called farms and farmers;) These farms, I say, attained to this title from the old *Saxon* word *fermion*, which signifies to feed, provide or yield victuals; so that a farmer signifies a victualler; for antiently the landlords did not receive money upon their leases for their rent, but corn and victuals, being such as the farm yielded off its growth, until it came by degrees into part money and part victuals; and at last, about the time of king *Henry* the first, the rent reserved was turned into money, and so hath hitherto continued amongst most men.

Yet amongst some, where the antient rents or reservations are not altered, the rent is in corn or victuals to this day, especially in college and church leases; and doubtless many of those antient reservations received their utmost period in the general dissolution of the religious houses, to the unsmall detriment of the industrious farmer.
Co. 7 Par. f. 13.

All leases for years reserving rent must be made of lands and tenements, whereunto the lessor may come to distrain; so that rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, tithes, fairs, markets, liberties, franchises, and the like: But if a lease be made by deed in writing of one of them, one may have an action of debt by way of contract; but one cannot distrain: But if any rent be reserved in such cases upon a lease for life,

§ 1. c. 1. § 1. c. 1. § 1. c. 1. § 1. c. 1. § 1. c. 1.

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it is utterly void. *Co. 1 Par. Inst. p. 47. Co. 7.*

23.

By *Holt* chief justice, if *A.* not having any thing in certain land, demise it by indenture to *B.* and afterwards *A.* purchases the land, this will be a good lease by estoppel; but if it appear by recitals in the lease that *A.* had nothing at the time of the demise, and afterwards he purchases the land as aforesaid, that will not enure by estoppel. *1 Lord Raym. 729. Hermitage and Tomkins.*

A tenant for life leased for years, the lessee assigns to him by parol, without deed, rendering rent: It was said by the chief justice, that although this assignment by operation of the law turned to a surrender, yet it was not an express surrender; and if the rent was not good by way of reservation, it was good by way of contract; and so judgement was given for the plaintiff, although all the days were not passed.

2 *Lev. 80.*

Note, That every quarter's rent is a several debt, and distinct actions may be brought for each quarter's rent. *1 Vmp. 129.*

Also a debt for rent is payable by an executor before bonds, because it savours of the realty, and is maintained in regard of the profits of the land received. *Idem 184.*

Action of debt lies for the lessor against an assignee of a moiety of the land, for the moiety of rent. *2 Lev. 231.*

Leases for term of years are chattels; so that if a man have a lease of lands for five hundred years, it is a chattel, and goes to his executor or

administrator, if he dispose not otherwise of it before his death. 32. or 23 *Lib. Ass.* 6.

That a lease for years, although it be a very long lease, cannot be intailed, (but may be assigned in trust to several uses, which may be an entail in effect): For the nature of a chattel cannot be turned into an inheritance. *Proff. Reg.* 400. *Idem.* 401.

That if a lease for years comes to be limited in tail, the law allows not a present remainder to be limited thereupon; yet it will allow a future estate arising upon a contingency only; and that to wear out in a short time. By the lord chancellor *Finch* in the duke of *Norfolk's* case, *fo.* 27. and the courts of equity have since extended this doctrine.

Every man who is seised of lands in fee-simple may lease out his land for what time or term he pleaseth himself: And so likewise might bishops have done formerly before the statutes restrained them. 32 *H. 8. c.* 28. 13 *Eliz. c.* 10. 18 *Ed.* 2. 6.

A tenant in tail being at age may by deed in writing lease out such lands as have been let to farm twenty years next before the lease made, reserving the old rent or more, not exceeding three lives or twenty-one years: The words [*without impeachment of waste*] must be omitted in it, and it must commence from the day of the making or date. And if there be an old lease in being, it must be surrendered, expired or ended within one year after the making of the new one, or else it is void. And a lease thus made binds the issue of the tenant in tail, if he die before the term be out: But if the tenant in tail die without issue,
the

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the donor may avoid the lease by his entry, and so may he in remainder; and though he accept the rent, yet he doth not thereby confirm the lease. *Vide 1 Jac. c. 3. Herri's Con. 62, 67, &c.*

A man that is seised of lands in fee-simple or fee-tail in the right of his wife, may make a lease by indenture in writing of his wife's land, in the name of himself and his wife, and she to seal thereunto, reserving the rent to himself and his wife and to the heirs of his wife; this lease shall be good against the woman and her heirs after her death.

Bishops, deans and chapters observing the rules, may make leases of such estates as they are seised of in fee, in right of their churches: And so may masters, provosts and fellows of colleges, and wardens of hospitals, if they be not prohibited by the private statutes of their foundations. *Vide 32 H. 8. c. 28, &c. as follows.*

LEASES by Statute Law.

I. *Stat. 32 H. 8. 28.* Leases made by tenant in tail, or by him who is seised in the right of his wife or church (they being of full age at the time of such lease made) shall be good and effectual in the law against the lessors, their wives, heirs and successors.

II. The statute shall not extend to any lease to be made of lands, in the hands of any farmer by force of any old lease, unless such old lease expired within a year after the making of the new; or to any grant to be made of any reversion of manors, lands, &c. nor to any lease of

such manors, lands, &c. which have not been let to farm, or occupied by farmers, twenty years before such lease made; nor to any lease to be made without impeachment of waste, nor any lease to be made for above twenty-one years, or three lives, from the day of the making thereof; and that upon every such lease there be reserved so much yearly rent as hath been usually paid for the lands so let, within twenty years next before such lease made; and the reversioners of the manors, lands, &c. so let (after the death of such lessor or his heirs) may have such remedy against such lessee, his executors and assigns, as such lessor might have had against such lessee.

III. Provided, That all leases made by the husband of manors, lands, &c. (being the inheritance of the wife) shall be made by indenture, in the name of the husband and wife, and she to seal to the same, and the rent shall be reserved to the husband and wife, and to the heirs of the wife. And here the husband shall not alien or discharge the rent, or any part thereof, longer than during the coverture, unless it be by fine levied by husband and wife.

IV. This act shall not extend to give liberty to take more farms or leases than might have been taken before this act, (*Vide Stat. 25 H. 8. c. 18.* that none shall hold above two farms together) nor to any parson or vicar, to make any lease otherwise than they might have done before.

V. All leases for years made within three years before the 24th of April, 21 H. 8. by writing indented, under seal of any person or persons of full age, *jure iuribus*, not unlawfully coerced, nor covert baron, of any manors, lands, &c. wherein

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he or they have an estate of inheritance to his or their own use at the time of the making thereof, and whereof the lessee or lessees, or their assigns, have now the possession by force of such lease or leases, and no cause of re-entry or forfeiture thereof had or made, shall be good in law against such lessors, their heirs and successors; so as so much yearly rent be reserved for the same, as was paid for the same within twenty years next before the making of such lease or leases; or else such lease or leases to be of no other force than they were before the making of this act.

VI. No fine, feoffment or other act done by the husband only, of the inheritance of freehold of the wife, shall make any discontinuance, or prejudice the wife, or any other who is to enjoy it after her decease; the fines levied by the husband and wife only excepted.

VII. This act shall not give liberty to the wife and her heirs to avoid any lease hereafter to be made of the wife's inheritance, by the husband and wife for one and twenty years and under, or three lives; whereupon the accustomed yearly rent for twenty years before is reserved, according to the tenor of this act.

VIII. This act shall not extend to make good any lease made by any ecclesiastical person, which is made void by authority of parliament, or by any such person or other now attainted of treason.

IX. *Stat. 1 Eliz. not printed. (Vide Abr. of Stat. Tit. Leases p. 401.)* All estates made by an archbishop or other bishop, of any manors, lands, &c. parcel of the possessions of their bishoprick, or united or appertaining thereto, to any person or persons,

persons, body politick or corporate, other than to the queen, her heirs and successors, and other than for the term of one and twenty years, or three lives from the time of such estate made, and whereupon the accustomed yearly rent or more shall be reserved or payable yearly, during such term of one and twenty years or three lives, shall be void to all intents and purposes.

X. *Stat. 13 Eliz. 10.* All grants, feoffments, leases, and other conveyances and estates, made by any master or fellow of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other (a) having any spiritual or ecclesiastical living, or any houses, lands, tithes, or other hereditaments, being parcel of their college, cathedral, chapter, hospital, parsonage, vicarage or other spiritual promotion, or belonging thereunto, other than for one and twenty years or three lives from the making thereof, and whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the term, shall be utterly void.

XI. This act shall not make good any lease or other grant against the private statutes of any college or collegiate church.

XII. This act shall not extend to any lease hereafter to be made upon a surrender of a former lease, or by reason of any covenant or condition contained in any former lease, and still continu-

(a) The words, *or any other, &c.* coming after parson or vicar, will not comprehend bishops, who are of an order that is superior. *Vide 4 Rep. 76.*

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ing; so as the lease to be made contain not more years than the residue of the years of such former lease, nor any less rent than is thereby reserved. This is a public act.

XIII. Stat. 13 Eliz. 1. 20. No lease made of any benefice or ecclesiastical promotion with *cure*, or any part thereof, (and not impropriated) shall endure any longer than while the lessor shall be ordinarily resident and serving the *cure* of such benefice, without absence above eight days in any one year; but that every such lease, *so soon as it, or part thereof, shall come into any possession or use above forbidden*, or immediately, upon such absence, shall cease and be void; and the incumbent so offending shall lose a year's profit of his benefice, to be distributed by the ordinary among the poor of the parish. Yet see *Digge's Parson's Counsellor* 229.

XIV. Provided, that every parson allowed to have two benefices may demise one of them (upon which he is not most ordinarily resident) to his curate only; but such lease shall endure no longer than during such curate's residence, without absence above forty days in one year.

XV. Stat. 14 El. 11. In the statute 13 El. 20. these words [*So soon as it or any part thereof shall come into any possession or use above forbidden, or*] repealed.

XVI. All bonds, contracts, promises and covenants hereafter to be made, for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion, with *cure*; or to take the fruits thereof (other than such bonds and covenants made for assurance of any lease heretofore made) shall be admitted of such validity (and no otherwise than) as leases thereof made: The like law

law is of leases, bonds, promises or covenants made by curates.

XVII. The branch of the statute of 13 *El.* 10. made to avoid certain leases made by certain persons having spiritual livings, shall not extend to houses situate in corporations or market towns, or the suburbs thereof, nor under the grounds appertaining to such houses, so as they be not the dwelling houses of such persons, nor have above ten acres of ground belonging to them.

XVIII. Provided, that no lease shall be made, by force of this act, in reversion, or without reserving the accustomed yearly rent at least, or without charging the lessee with reparations, or for longer term than forty years. Neither shall any such houses be aliened, without purchasing presently after other lands in fee-simple, of as good value, and as great yearly rent, as the houses so alienated.

XIX. *Stat.* 18. *El.* 6. Upon leases made by colleges in the two universities, *Winchester* and *Eaton*, the third part of the rent shall be reserved in grain, to be delivered to them yearly at days prefixed, after the rate of 6s. 8d. for a quarter of wheat, and 5s. for a quarter of malt, or under those prices: Or it shall be in the election of the lessee to pay them in kind, at the best rates found in those several markets respectively the next market-days before the day prefixed for the payment or delivery thereof; and all leases otherwise made, and all bonds and assurances given to the contrary, shall be void: Which said grain or money shall be expended for the relief of the commons and diet of the said colleges respectively without fraud, in pain of deprivation of the chief rulers

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rulers of such colleges respectively, and of all others consenting thereunto.

XX. This act shall not extend to any lease to be made by the president and scholars of St. John's college in Oxford, of the manor of Wiffeld, to the heir male of Sir Thomas White, knight, late alderman of London, and founder of the said college.

XXI. Stat. 18 Eliz. 6. All leases made by such persons as are mentioned in the Stat. 13 El. 10. where another lease is in being, and not to be expired, surrendered, or ended, within three years next after the making of such new lease, shall be void; And all bonds and covenants for renewing of any such lease contrary to this act, or to the said statute of 13 El. 10. shall also be void. Howbeit, this act shall not extend to any lease or leases heretofore made by any such person or persons.

XXII. After complaint to the ordinary, and sentence given upon any offence committed by the incumbent against the Stat. of 13 El. 20. whereby he ought to lose the profits of his benefice; the ordinary, within two months after such sentence given, and request made by the church-wardens, or one of them, shall grant the sequestration thereof to such inhabitant or inhabitants there, as to him shall seem convenient; and upon default in the ordinary, it shall be lawful for every parishioner there to retain his tithes, and for the church-wardens to take the profits of the glebe, and other rents and duties of such benefice, to be employed to the use of the poor, until the sequestration shall be committed by the ordinary; and when the church-wardens and parishioners are to account

account to him or them to whom such sequestration shall be committed, and he or they shall employ the said profits to such uses, as by the said statute of 13 *El.* 20. are appointed, in pain to forfeit the double value of the profits withholden, to be recovered in the ecclesiastical court by the poor of the parish.

XXIII. *Stat.* 43 *Eliz.* 9. All judgments hereafter to be had for the intent to have or enjoy any lease contrary to the statutes of 13 *El.* 20. 14 *El.* 11. and 18 *El.* 11. or any of them, shall be deemed void, in such sort as bonds and covenants are appointed to be void, which are made for that purpose.

XXIV. *Stat.* 12 *Car.* 2. c. 31. Leases and grants by colleges and hospitals, and elections of heads, masters and fellows, made during the late troubles, confirmed under some exceptions and provisos.

XXV. *Stat.* 13 *Car.* 2. c. 4. The king enabled to make leases, grants, and copies of offices, lands, tenements and hereditaments, parcel of the dutchy of *Cornwal*, and a confirmation of such as be made not exceeding one and thirty years, or three lives.

If bishops, deans and chapters, observe not the aforesaid rules in their demises, yet their leases shall be good against themselves for their lives. *Vide Co. Lit.* 45. a. 1 *Brownl.* 21. *Leon.* 131.

Generally a lease for years must be for a time certain, and ought to express the term, and when it should begin, and when it should end certainly; and therefore a lease for a year, and so from year to year, is a lease for two years.

By *Stat.* 5 *Geo.* 3. c. 17. sect. 1. "All leases for one, two, or three life or lives, or any term
not

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not exceeding twenty-one years, already made and granted, or which shall be granted, of any tythes, tolls, or other incorporeal hereditaments, solely, and without any lands or corporeal hereditaments, by any archbishop or bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons who are enabled by the several statutes now in being, or any of them, to make any lease or leases for one, two, or three life or lives, or any term or number of years not exceeding twenty-one years, of any lands, tenements, or other corporeal hereditaments, shall be deemed as good and effectual in law against the persons granting the same and their successors, to all intents and purposes, as any lease or leases already made or to be made by such persons, of any lands or other corporeal hereditaments now are, by virtue of the statute of 32 Hen. 8. or any other statute now in being."

By Sect. 2. "But no master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or other ecclesiastical persons as aforesaid, may grant leases for any longer or other terms than, by the local statutes of their several foundations, they are now respectively enabled to do."

By Sect. 3. "If the reserved rent in any lease or leases already made, or to be made, for one, two, or three life or lives, or years, as aforesaid, in pursuance of the several acts already in being, or by this present act, shall be unpaid by the space of twenty-eight days after any of the days wherein

wherein the same are made payable; the persons granting such leases, or their executors, administrators, and successors respectively, may bring an action of debt against the lessee or lessors, their heirs, executors, administrators, or assigns, for recovering the same, in the same manner, and as fully and effectually, as any landlord or lessor, or other person, might do for recovering of arrears of rent due on any lease or leases for life or lives, or years, by the laws now in being.

By Sect. 4. This act shall be deemed a public act and be judicially taken notice of as such, in all courts of law and equity, without specially pleading the same.

Also a lease from year to year, so long as both parties please, after entry in any year, is a lease for that year, &c. until warning be given to depart. *Noy's Max. 65.*

A lease which is only voidable, and not absolutely void, must be made void by the lessor's re-entry, (if he will) and putting out the lessee. Or else it may be continued or affirmed by receiving the rent. *Pract. Reg. last pub. 399.*

Also where there is a clause in the lease, that if the rent be behind and unpaid at such a day, &c. the lease shall be void: Now if there was a demand made at the day, and the rent not paid, this lease is not absolutely void until an actual entry; it is only voidable; and the acceptance of the rent before any entry made, shall make that, which was a voidable lease, a good lease. *Idem. Nam quilibet potest renunciare juri pro se introducto.*

If a lessee for years grant a rent-charge, and after surrender, yet for the benefit of the grantee the term hath continuance, although *in rei veritate*

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it is determined, and the grantor himself shall not derogate from his own grant, to make it void at his pleasure.

Tenant for years of an advowson granteth the next avoidance and donation, if the same church should become void during the term, &c. and afterwards surrenders his term, yet if the next avoidance be within the term, the grant is good, for the years cannot determine but by the effluxion of time, and the law implies a limitation, if the church do become void during the term. *Quia expressio eorum quæ tacite insunt nihil operatur.*

A lessee covenanted for himself, his executors and administrators, with the lessor, that he, his executors or assigns, shall build a brick wall upon part of the demised premises, and afterwards the lessee makes an assignment of his lease to C. D. for his term: in this case the assignee is not bound to build the wall, because the things were only collateral, and were not in esse, nor part of the demise, &c. *Co. Lib. Rep. 69, 70, &c. 5 Co. 16, 17.*

But *Note*; Where the lessee has built a wall or house on the premises, and afterwards assigns his term, the assignee is bound to keep such wall or house in reparations.

When a covenant extends to a thing in being parcel of the demise, then the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and shall bind the assignee, although by express words in the covenant he be not bound. *Vide 5 Co. 17, 24. Dyer 27.*

But if the covenant extends to a thing which had no being at the time of the demise made, that cannot

cannot be annexed or appurtenant to a thing which had no being. *Ibid.*

If a lessee covenants to repair the houses demised to him during his lease, this is part of the contract, and shall bind the assignee, although by the covenant he is not expressly named. *Ibid.*

But where the covenant concerns a thing not in being at the time of the demise, but to be made after, this shall bind the covenantor, his executors and administrators, but not the assignee. *Ibid.*

If a lessee covenants for him and his assigns to build a house upon the land of the lessor, which is not parcel of the demise, or to pay any collateral sum of money to the lessor, or to a stranger, this shall not bind the assignee. *Ibid. Quære.*

If a man demise lands for years with a stock of cattle, or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators and assigns, to deliver the stock of cattle or the sum of money at the end of the term, this covenant shall not charge the assignee. *See after Chap. X.*

If an assignee of a lease be evicted, he may have a writ of covenant; so shall a tenant by statute, or by *elegit*, or he to whom a lease is sold by virtue of an execution.

If a man grant to a lessee for term of years, that he shall have so many *isovers* as shall serve to repair his house, or that he shall burn in his house, or the like, during the term, that is appurtenant to the land, and shall run with the same as a thing appurtenant, in whose hands soever the same cometh. *Co. Inst. 41.*

The

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The statute extendeth only to covenants which touch the thing demised, and not to collateral covenants. 32 H. 8. c. 24. *Vide ante.*

An assignee of an assignee, executors of an assignee, assigns of executors or administrators of every assignee, may have an action of covenant, for all are comprised within this word [Assignee], and the same right that was in the testator or intestate, descends to the executors or administrators. *Cok. l. 5.*

A lessor may have an action for rent against the executor of the lessee, after an assignment made by him. *Leon 127. 2 Vent. 209.*

If an assignee assigns over, until notice given of the assignment to the lessor, and tender of arrears, he cannot by the assignment discharge himself of the rent. *1 Lev. 215.* But that the executor of a lessee assign before rent arrear without notice. *3 Lev. 295.*

A lessee for an hundred years being out of possession cannot assign. *1 Lev. 270.*

Lessor assigns his rent upon a lease for years, and the lessee attorns, it is said the grantee may maintain an action of debt for the rent. *1 Lev. 22.*

A lease is made for life, the remainder over for life, the remainder over in fee; the first lessee maketh waste: And because he in the fee hath no remedy by the common law, and waste is a wrong prohibited, he shall have relief in chancery. *Crompt. 49. 5.*

A woman sole takes a consideration for making a lease for one and twenty years, and then marries; and she and her husband made the promised lease; before the end of that term the lessee surrenders, and

and takes a new lease for one and twenty years more; the husband dies, the wife *ousts* the lessee, who sues in chancery to have the first lease continued for the first one and twenty years, and could not have remedy, because the surrender was voluntary, and the court gives no relief against a voluntary act.

Concerning leases, &c. by baron and feme, see *D'Anvers's Gen. Abr.* Tit. *Baron and Feme*, fol. 698, 699, 700, &c.

Also where a man shall be relieved in chancery against deeds and leases, see *D'Anvers's Gen. Abr.* Tit. *Chancery* and Tit. *Leases*.

A lease is made of a house and wood, wherein it is covenanted, that the lessee shall have house-boot and fire-boot; by this it is implied and meant, that he should not have any of the woods to use, or convert to any other purpose; but that they do belong to the lessor. And the lessor shall have help in chancery, leaving to the lessee sufficient for house-boot and fire-boot.

Under the name of lands are comprehended not only gardens, meadows, pastures, rivers, woods, moors, waters, marshes, furze and heath, but also messuages, houses, tofts, mills, castles, and such like, *Co. Lit.* l. 1. s. 2. *sect.* 14. but of a house with the appurtenances no land passes. *Pl. Com.* 85. 86.

If one that leases at will does any act inconsistent with the continuance of the lease at will, it shall determine it from such time as the tenant at will takes notice of it. If the lessor says the lessee shall hold it no longer, the lessee (as soon as he knows of the words) may take advantage of them.

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them as a determination of the lease. 1 Vent. 247. Raym. 204. See after.

It was resolved, that a lease for a year, upon no other consideration than reserving a peppercorn, (if it be demanded) shall work as a bargain and sale, and so as to make the lessee capable of a release. 2 Mod. 249. 1 Mod. 162. 2 Vent. 35. 10 Co. Sutton's Hospital's case, and that the reservation made a sufficient consideration to raise an use, as by bargain and sale.

A lease for ninety-nine years, if two persons so long live, without saying [or either of them] determines upon the death of either. 2 Vent. 74. 5 Co. 9. 2 Cro. 378. Dyer 67. & 2 Inst. 225.

Where several lands, held part for life and part for years, are demised to A. for years, to hold from the time of the death, surrender, forfeiture, or determination of the estate and term aforesaid of the first lessees, and the estate in one of these parcels determines, the term granted to A. shall commence immediately in the said parcel, although the other estates are in being. Saund. 183.

If a lessee enters before his term commences, and continues in possession after, he is a disseisor all the time. 1 Lev. 46.

Upon a lease made to two for their lives, without impeachment of waste during the said lessees lives, it was held that this privilege would hold to the survivor; for it is reasonable to give the privilege as large a construction as the interest. Anderson 251.

Note; That if the lessor seal the lease, and not the lessee, yet it is good against the lessor as if both had sealed. Noy's Max. 57.

And

And if at any time there happen any variance between the indentures, it shall be taken as the deed of the lessor is, and the other shall be intended only the mistake of the writer, because the deed of lessor is the principal, and the other but only a counterpart. *Ibid.*

Deeds between parties, indented or not indented, are suable and releasable by the parties, and not by strangers, although they are to the use of the strangers. 3 *Lev.* 138.

To plead a writing under a man's hand does not imply a deed. 3 *Lev.* 234.

If a man demise any lands or tenements to another by lease parol, the lessor ought to be seised of the lands or tenements which he so lets at the time of the lease parol made, or else he cannot maintain an action for his rent; for the lessee may plead that the lessor had nothing in the premises at the time of the lease made, and then is barred of his action: But if the lease be made by deed indented, then the lessee cannot plead this plea. *Lit. Ten.* l. 1.

If a man lets lands to another by lease, to hold the same at the will of the lessee; the law intends it to be at the will of the lessor also, and he may put the lessee out when he pleases; likewise if it be let at the will of the lessor, it is intended at the lessee's will also, for the lessor cannot force him to stay longer than he pleases. *Coke 1 Par. Inst.* 55.

A covenant made between landlord and tenant, that the tenant shall have a new lease upon the surrender up of his old lease; and afterwards the lessor makes a lease by fine for more years to a third person; in this case the lessor hath broke his covenant,

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covenant, although the lessee did not surrender; which by the words of the covenant ought to have been the first act, because the lessor, by letting the lease to a stranger, did disable himself either to take the surrender, or make the new lease. *Noy's Maxims*, p. 13.

Rent in arrear upon a lease for years goeth to the executors of the lessor, if he die. As if *John Doe* make a lease for years to *Richard Roe*, and the lessee covenanteth and granteth to pay unto the lessor his heirs and assigns, the sum of twenty pounds yearly during the term in the lease granted; in this case, if the lessor die, his executors shall have the rent in arrear, and not his heirs, because rent once due is part of the personalty.

Where a man covenants for himself and his assigns to permit, &c. If a breach be laid in the assigns, this covenant shall only relate to the assigns after the deed was made, and not before. *2 Vent.* 278.

Where lessee covenanted to build three houses upon the premises, and keep them in repair, he built five, and let one of them fall to decay; and it was adjudged that the covenant extended to that also. *2 Vent.* 128. *3 Lev.* 265.

If a man covenants not to inclose, inclosure with gaps is a breach of the covenant. *Lit. Rep.* 267.

A later covenant by a second indenture cannot be pleaded in bar to the former, but the defendant must bring his action on the last indenture if he will help himself. *2 Vent.* 218.

If a man by deed grants a watercourse and stops it, the grantee shall have an action of covenant. *1 Saund.* 322.

If a lease be made of an house and *estovers*, and the lessor destroy all the trees, the lessee may have an action of covenant. *Id. Ibid.*

Also if a lease be made of an house, and a piece of land (except the ground on which the pump stands) with the use of the said pump, the lessee may repair the pump, but no action of covenant lies against the lessor for not repairing it. *Ibid.*

When the use of a thing is granted, all is granted by which the grantee may have and enjoy such use. *Id.*

Although the breach of the testator's covenant is by the proper default of his executors, yet the judgment ought to be of the goods of the testator. *Idem 112.*

An action of covenant does not lie against a grantor for not repairing the thing granted. *1 Saund. 322.*

An assignee of a reversion may maintain covenant for repairs against the lessee, although assignees are not named in the covenant in the lease. *1 Lev. 109.* Covenant lies for a grantee of a reversion against the lessee after assignment of his term. *3 Lev. 233.*

Any words in a deed purporting an agreement to pay money, &c. amount to a covenant to do it. *1 Lev. 48.*

A proviso to pay amounts to a covenant to pay. *Idem 151.*

Covenant that he or his under-tenant should not dig, &c. and B. who held of Y. who held of H. who held of E. did dig, &c. Held B. was under-tenant of E. *1 Lev. 144.*

A lessee covenants with the lessor, his executors and administrators, to repair; this shall

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go with the land, and the heir may sue upon it. 2 *Lev.* 92.

In expounding all deeds, the words and the intent of the parties ought to be observed, especially in covenants. *Lit. Rep.* 209. 3 *Lev.* 100.

If there be a covenant in a lease, that if the rent be behind and unpaid for such a time; (that is, by the space of so many days after the usual day or time of payment in the lease appointed and reserved) then the lease to be void; in this case, although the lessor do accept of the rent after such failure made, here no such acceptance of the rent can make the lease good. *Dyer*, f. 51.

If a tenant take houses and lands by lease for years, and covenants with the lessor to support, uphold, and maintain the houses during this term, and to leave the houses and lands in as good repair, plight and estate, as he found them, in this case, if it should happen that the houses be casually burned by fire or lightning, or blown down by a tempest, or destroyed by any other accident, if the lessee do not repair and build them again, and leave them as good as he found them, the lessor may sue his said covenant against him at the end of his lease; but if a tenant make waste in cutting of wood or timber contrary to the proviso's, exceptions or covenants in this lease, for such a breach the landlord may bring his action of covenant, before the end of the term. *Noy's Max.* p. 16. See after.

A man takes a lease for years, and covenants and grants to and with the lessor, for him and his executors, to repair the houses as often as need requires; and afterwards the lessee assigns over the lease to another, and the assignee suffers the

houses to decay for want of repairs ; in this case the lessor may bring an action of covenant against the assignee, although he be not named in the covenant. *Hughe's Grand Abridgment*, 1 Par. p. 492. c. 19.

A landlord lets a lease, and covenants with his tenant that he shall have sufficient hedge-boot, to be assigned him by the landlord or his bailiff ; in this case the tenant may not take hedge-boot without assignment. *Co. 1 Par. Inst. f. 41.*

If a man by indenture take a lease of a house that is old, ruinous, or wanteth repairs, and covenants with the lessor to leave this house at the end or expiration of the lease in good repair, in this case he is bound to leave this house in good repair ; but if he do not covenant to do it, the law then will not oblige him to do it. *Perkins Tit. Conditions*, 738.

How houses are to be now built within the bills of mortality, according to the late act of parliament, see at the latter end of this treatise.

If a man by indenture takes a lease for years of a wood, and covenants with the lessor to leave his wood in as good a condition as it was at the time of the lease made, and during the term the wood is destroyed and blown down by violent winds and tempests, in this case the landlord can have no action against the tenant for not performing of this covenant, because it is impossible for him to perform it ; and the law enforceth no impossibilities : Otherwise it is if he take a house, and that be blown down. *Hughe's Grand Abr. p. 496.*

Touching bonds for performance of covenants, if a man takes a lease for years, rendering rent, and

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and enter into bond to the lessor to perform all covenants and agreements contained and comprized in the lease, if he fail in payment of rent, the bond is forfeited, for the payment of rent is an agreement. *Goldsbrough, p. 16.*

If a man be bound in a bond to repair the houses of the obligee as often as need shall require during a certain time, and afterwards the houses want reparation, in this case, although the *obligor* doth not know that they want reparations, yet he is bound to take notice of it at his peril, for ignorance will be no excuse in this case, because he hath bound himself to it. *Doct. and Stud. lib. 2. c. 47.*

But if the condition had been, That he should repair such houses as he to whom he was bound should assign, and after he assigned certain houses to be repaired, but he that is bound hath no knowledge of that assignment, this ignorance shall excuse him in the law, because he hath not bound himself to any reparation in certain, but such as the *obligee* will assign; and if he assign none, the *obligor* is bound to none: And therefore, because he that shall make the assignment is privy to the deed, he is bound to give notice of his own assignment; but if the assignment had been appointed to have been made to a stranger, then the *obligor* had been bound to have taken notice thereof at his peril. *See more Observations on Covenants in Leases, &c. at the End of this Treatise, Chap. X.*

If a man makes a lease for years with warranty, yet this is not a warranty in the law, but a covenant, because the lease is but a chattel;

and if the lessee be ousted, he may bring his action of covenant against the lessor.

If *A.* be seised of twenty acres of land, and let the same to *B.* by lease for life or years, and *A.* reserves to himself five shillings rent, payable at *Christmas*, and *B.* binds himself to *A.* in a bond of one hundred pounds to pay the rent reserved upon the lease justly, according to the law; if before any day of payment *A.* puts *B.* out of any part of the land, and he doth occupy the residue for the whole term, and will not pay any rent, yet the bond is not forfeited; for by putting the tenant out of parcel of the land, the whole rent is in suspence, for it arose from the lessor's own wrong: But if one day of payment be past before the *ouster*, then the tenant must pay the rent, or else he forfeits his bond.

But if a stranger, who hath no right in the lands, do put the lessee for years out of the same land before any day of payment, and keep possession thereof until the day of payment be past, in this case the tenant ought to pay his rent at the day whereon it is appointed to be paid, or else he forfeits his bond, for he has his remedy at law against the wrong doer.

If three *copartners* be seised of a manor, and one of them, without consent of the other two, lets a lease of the whole manor in her own name unto *J. D.* for five years, paying ten pounds yearly at *Christmas* unto the lessor and her heirs, and *J. D.* enters into bond in five pounds to pay the rent accordingly, and before any day of payment is come, the other two *copartners*, who agreed not to the letting of the lease, do put the lessee out of the whole manor, and keep the possession until a day
of

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of payment is come, here the lessee ought to pay a third part of the rent reserved to his lessor, or otherwise he forfeits his bond, because the other two *copartners*, who ejected him out, have right but in two parts of the manor. *Perkins* 828.

A man makes a lease to three persons upon this condition, that neither they nor any one of them shall alien, set, or let that lease to any other without licence first obtained from the landlord: Now if the landlord do give licence to any one of them to let or alien, then the other two may alien without licence; for the condition being determined to one, is determined to all. *Hughes's Grand Abr. 1 Part, p. 428. See after.*

In the same nature is a release where many persons commit a trespass, if he against whom the trespass is committed do release one of the trespassers, that release is as effectual to all the rest, as if they had been particularly named therein.

If a landlord do enter for a condition broken, or the tenant surrender up his lease, or his term be expired, yet the landlord may have an action of debt for the arrears of rent, if any be. *Noy's Max. p. 72.*

If a man lets a lease of lands upon a special condition, that is, that the lessee shall not alien the same to such a man, or such a man, then the condition shall be taken according to the words; and, notwithstanding that condition, they may be alienated to any other, but to them to whom it is expressly prohibited that the lands should not be alienated unto: And if the lands in that case be alienated to one that is not excepted in the condition, then he may alien the land to him that is first excepted, without breaking of the condition;

for conditions are taken strictly in the law, and without equity. *Doctor and Student*, l. 2. c. 35.

As, if a lease be made to *A.* upon condition that he shall not let or alien the same to *B.* if the tenant alien to *C.* and he alien it to *B.* the condition is not broken.

If a man be seised of lands in fee, and let the same by indenture of lease to a stranger, paying five pounds rent *per Ann.* with a condition, That if the lessee will hold over ten years to him and his heirs, that then he shall pay twenty pounds *per Ann.* and the indenture is executed by livery and seisin to the lessee; in this case the lessor shall have an action of debt for the rent in arrear within the ten years, which proveth the freehold and the fee are not in the lessee before the ten years expired: But after the expiration of the ten years, if the lessee doth continue the possession of the same land, and doth occupy the same by virtue of the *indenture*, then he hath fee, and shall pay the twenty pounds as the rent-seck. *Perkins* 710. c. 11.

But if a man seised in lands doth let the same land by lease for term of life, yielding to him a rose for the first six years, and if he will hold the land over the six years, then to pay three marks *per Ann.* here the freehold is immediately in the lessee. *Co. 1 Par. Inst. f. 218. b.*

A man makes a lease for years with this condition, That if the lessor do alien the reversion within the term granted by the lessee, then the lessee shall have the fee, and the lessor doth alien the reversion in fee by fine to a stranger; in this case the lessee shall not have a fee, for the freehold and the fee are lawfully in the *conusee* before the lessee can take it by condition: But if the lessor had

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had granted the lands to a stranger by deed only, then the lessee should have had fee by the condition. *Perkins* 729, 739.

A lease made by a man before entry, after a recovery, is void. 2 *Lord Raym.* 853. 7 *Mod.* 51. *Salk.* 2.

Demise by parol of an office is void. *Id.*

If a man have a lease for years, and demise or grant the same upon condition, and die, his executors or administrators shall enter for the condition broken, for they are privy in right, and represent the person of the dead. *Perkins* 833.

If a man make a lease for years upon a condition, That the rent shall be paid at *Christmas*, and before that time comes the lessor give a general release to the lessee of all actions and demands, this release doth not acquit the lessee of the rent, but the lessor may sue for it, because it was neither due, nor to be paid at the time of the release made; and it is a thing not merely in action, because it may be granted over. *Lit. l. 3. c. 8.*

If a landlord lets a lease for years to two tenants to hold jointly, with a condition, That, if the lessees die before the end of the term, the lease shall be void; now these lessees make division; and one of them aliens his part, and dies; in this case the lessor cannot enter upon the part of him that died, but the alienee shall enjoy his half-part during the life of the surviving lessee. *Dyer, p. 67.*

A. as attorney to *B.* lets *B.*'s house for a term of years in his own name; as it was not made in the name of *B.* whose house it appeared to be, and that the plaintiff only made it as attorney, there could be no estoppel, the lease itself was void, and the covenant to pay it accordingly, and the plain-

iff could not maintain the action. 2 *Lord Raym.* 1419. *Str.* 705. 8 *Mod.* 116. S.P.

A lease made for years upon condition, That if the lessee demise the premises, or any part thereof, other than for a year, to any person or persons, then the lessor and his heirs to re-enter; the lessee afterwards devises this lease to his son by his will; this is a breach of the condition.

If a man of his meer motion give lands to *H. H.* and to his heirs, by indenture, upon condition, That he shall yearly at a certain day pay unto *John at Style*, out of the same land, a certain rent; and if he do not pay the rent, that then it shall be lawful to *John at Style* to enter; in this case, if the rent be not paid to *John at Style*, the said *J. S.* may not enter into the lands by the law, though the words of the indenture be, That he shall enter; for there is an ancient maxim in the law, That no man shall take advantage in a condition, but he that is party or privy to the condition; and this man is not party nor privy, and therefore he shall take no advantage of it. *Doctor and Student, lib. 2. c. 20. f. 93.*

In many cases the intent of the party is void to all intents, if it be not grounded according to the law.

As, if a man make a lease to another for term of life, and after, of his meer motion, he confirmeth his estate for term of life to remain after his death to another and his heirs; in this case that remainder is void in law; for by the law there can no remainder depend upon any estate, but that the same estate beginneth at the same time that the remainder doth: And in this case the estate began before, and the confirmation enlarg-
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ed not his estate, nor gave him any new estate. But if a lease be made to a man for the term of another man's life, and after the lessor, only of his mere motion, confirmeth the land to the lessee for term of his own life, the remainder over in fee, this is a good remainder over in fee. *Doctor and Student*, c. 20. f. 94. because it gave the tenant a new and greater estate than he had before, and consequently the remainder might be supported by it.

No grant can be made but to him that is party to the deed, except it be by way of remainder: And therefore, if a man make a lease for term of life, and afterwards the lessor grant to a stranger, that the tenant for term of life shall have the land to him in his heirs, that grant is void if it be made only of his mere motion without recompence. *Doctor and Student*, l. 2. c. p. 20. 64.

Likewise if a man make a lease for term of life, and after grants the reversion to one for term of life, the remainder over in fee, and the tenant attorneth to him that hath the estate for term of life only, intending that he should have advantage of the grant; his intent is void, and both shall take advantage thereof, and the attornment shall be taken good according to the grant. *Ibid. See after.*

If a tenant for the term of another man's life dies, living the other man, he that doth first enter upon the estate after his death, shall be tenant for the other man's life, and shall be liable to the payment of the rent reserved. *Co. Lit.* 41.

In the case of occupancy (which ariseth by conveyance) as,

Where lands are conveyed to A. for the life of B. and A. dies without making any estate or assignment

signment thereof, here whosoever first entereth after the death of *A.* getteth property in that land during the life of *B.* for the land cannot revert to him that leased to *A.* till *B.* die; and to the heir of *A.* it cannot go, for it is not an estate of inheritance, nor descendible to the heir without special words; and as for the executors of *A.* they cannot have it, for that is not an estate testamentary.

But *Co. Lit. f. 41.* shews how this occupancy may be prevented, by adding these words in the grant, *To have and to hold to A. and his heirs, during the life of B.* for then it is descendible to the heir.

How also it may otherwise be prevented by assigning the lease for life over to friends and their heirs, in trust during the life of *B.* But the statute * 29 *Car. 2. c. 23.* hath provided, That the lessee or grantee may devise such estate for another's life, by his will, in presence of three or more witnesses.

And if he devise it not, and his heir become occupant, it shall be chargeable in his hands as assets by descent, as in case of lands by fee-simple.

And in case there be no special occupant, then it shall go to the executors or administrators off the party that had the grant, and shall be assets. See the *Statute.*

And some have held, That an executor *de son Tort* is as much within this act to be charged as a rightful executor; and that the entering into land and leasing it, is enough to make him an executor *de son Tort.* *Q. et Vide 5 Co. 33. &c.*

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If a tenant hath a lease for twenty years of lands and tenements, and grant the same lands for part of his term to a stranger, reserving to himself forty shillings rent; in this case he may distrain for the rent reserved, or have an action of debt at his pleasure, because by common intentment he is to have the same land after the years determined, because he hath granted but parcel of the years, so that the remainder remains in him *Perkins* 693.

If rent be granted to a man, he may grant it away to another before he is seised thereof *Idem* 108.

If a man and his wife be ejected of a term in the right of his wife, and the husband bring an *ejectione firmæ* in his own name, and do recover and die; in this case his executors shall have it, and not the wife, because the recovery in his own name did vest the term in himself. *Co. Lit.* 46.

If a man be possessed of a term of forty years in right of his wife, and make a lease for twenty years reserving rent, and die; here the executors of the husband shall have the rent for that term, but the wife shall have the remainder of the term when the twenty years are out: But if he had granted the whole term, she could have had nothing. *Co. Ibid.*

A release made to a tenant for term of years before his entry, is void; but a release of the rent before entry is good. *Co. Lit.* 270.

If a man makes a general release of all demands, it doth not release rent due upon a lease for years. 2 *Lrv.* 210.

The tenant may grant away his interest to another before entry; and although the lessor do die before

before entry, yet the tenant may enter into the lands; and if the lessee die before he enter, his executors or administrators may enter; and if a lease be to two, and one of them die before entry, the other may enter by survivorship; and a lessor cannot grant away a reversion by the name of a reversion, before the entry of the tenant.

If a man grant to a tenant for years, that he shall have so many *flowers* as shall serve to repair his house, or that he shall burn within his house, or such like, during the term, this is appurtenant to the land, and shall run with the same as a thing appurtenant, in whose hands soever the same cometh. *Co. Lit.* 41.

If two tenants in common do grant a rent of ten shillings, this is several, and they shall be charged with twenty shillings rent: but if they make a lease, and reserve ten shillings rent, they shall have no more but only ten shillings between them. *Co. Lit.* 197.

Lease by tenants in common cannot be pleaded as a joint-lease. 1 *Lord Raym.* 404. So said by *Blencowe*, *arguendo*.

If two *copartners* make a lease reserving rent, they shall have this rent in common, as they have the reversion; but if afterwards they grant the reversion, excepting the rent, then they shall be joint-tenants of the rent, for in the first case it is a rent-service following the nature of the reversion, in the other it becomes a rent-sock.

If a man leases lands for years reserving rent, and a stranger doth recover part of the land, then the rent shall be apportioned, *viz.* divided, and the tenant shall pay, having respect to that which is recovered, and to that which still doth remain
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in his hands according to the value, to each party proportionably. *Dyer*, 56 & 82. *See after*.

And for a full understanding of apportionment of rent, see *D'Anvers's Gen. Abr. f. 504, 505, &c.* Tit. *Apportionment*.

If a man make a lease, excepting a close and wood, the law giveth him a way to come to it

If a tenant for years do take a new lease for more years, this is a surrender in law of the old lease. *Watt and Maidwell's case, Hil. 3 Car. R. 1302. B. R. Perkins 117. Hutt. Rep. 104.*

A lessee for years cannot surrender before his term begin, neither can he surrender part of his lease, but he may grant part of it. *Noy's Max. 74. Vide antea.*

If the reversioner makes a lease for years of his reversion, the lessee in possession, though he has a greater term than the lessee of the reversion has, yet he may surrender to the lessee of the reversion. 1 *Lord Raym. 402*

If a tenant for life or years remove his goods out of the house and land, by reason of the greatness of the rent, or for some other cause, and the lessor do enter into the house and lands, this is no surrender of the lessee *Idem, p. 72.*

If a tenant for years assign over his term and die, his executors shall not be charged for rent due after his death.

And if the executors and administrators of a lessee for years do assign over their right in the lease, there lieth no action of debt against them for rent after such an assignment by them made. But *vide contra, antea, & 2 Vent. 209.*

If a tenant for years assign his lease to another, the landlord may charge which of them he will; but

but if he once accept of the rent from the assignee, knowing of the assignment, he cannot afterwards bring an action of debt against the lessee for rent due after the assignment. *Hern's Law of Conv.* p. 110.

For, by acceptance of rent by the lessor from the assignee, the privity of the contract is determined, and the action of debt against the first lessee is gone. 1 *Saund.* 240, 241.

But after such acceptance the lessor or his assignee may maintain an action of covenant against the first lessee upon his covenant for payment of rent. *Idem* 240. *Vide* 2 *Saund.* 302.

A lessor may refuse to accept of an assignee to be his tenant at one time, and yet may accept of him afterwards when he pleases. 2 *Saund.* 282. And so may have his election to sue the lessee or his assignee for the rent: but after acceptance from the assignee it is otherwise, as above.

If a lessor grant away the reversion after the assignment of the lessee, in this case the grantee cannot have an action of debt against the lessee for the rent, because there is no privity between them. *Poph.* 55. 2. *Wills. Rep.* 375. S. P.

Ruled by *Holt* chief justice, that if *A.* possessed of a term for an hundred years, grants the land, *habendum* for forty years, to begin after his death, it is a good new lease, and a man possessed of a term for twenty years may grant the land for nineteen years, to commence after his death, and it will be good for so many of the twenty years as shall be unexpired at the time of his death. *Lord. Raym.* 737.

It is noted, That a reversion of a term is not assignable without deed and attornment. 3 *Lev.* 155
By

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By the statute 4th & 5th An. for amendment of the law, it is enacted, " That all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estate any such reversion or remainders shall or may be expectant or depending, as if their attornment had been had and made.

" Provided nevertheless, That no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusée or grantee."

If a lease for years be made to a man without any consideration, the lessee shall be seised to his own use. *Perkins* 537.

If a man make a lease of lands to another, and to his heirs, for the term of twenty years, intending that if the lessee die within the term, that then his heirs should enjoy the land during the term, in this case his intent is void; and if the lessee die, his executors, and not his heirs, shall enjoy the term; for by the law of the land all chattels shall go to the executor, and not to the heir. *Doctor and Student*, l. 1. c. 24.

If a man lets a house with the appurtenances, no land passeth thereby; but if it be with all lands thereunto belonging, here the lands used with the houses do pass. *Hern's L. of Conv.* p. 104.

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If a man take a lease of his own land by indenture, he is then concluded to say, That the lessor had nothing in the land at the time of the making of the said lease; but after the lease is out, the *estoppel* is removed. *Terms de ley, Estoppel, Co. 1 Par. Inst. f. 47.*

If two persons be joint-tenants of a lease for years, and one bid the other go out of the house, and he goeth so out, he that goeth out may have an *ejectione firmæ* against the other, as well as if he had ejected him out by force. *Bourlie's case, 24 Car. Clayton's Rep. p. 111.*

One who had power to lease for ten years made a lease for twenty; decreed in equity that it was a good lease for ten years. *Perry v. Bowen, 15 Car. 2. Chancery Cases 1. p. 23.*

A lease was made to one who assigned it to another, the lessor received the rent of the assignee which became due in his time, but had no particular notice given him of the assignment: It was adjudged in this case, that no special notice need be given by the lessee of the assignment, but that the acceptance of the rent of the assignee was a sufficient notice, and he could not resort to the first lessee for his rent afterwards. *Mich. 11 Jac. B. R. Marsh and Brace's case, 2 Bulst. 151.*

Where one lets his land for life or years in which are coal-mines that are open, the lessee may dig them; but the lessee cannot make new mines where none are open before. *Shepherd's Abr. 1224.*

The plaintiff married the defendant *Wallis* (who was before married to another woman); *Wallis* made a lease of her land, and received the rent of the tenants: The former marriage being dis-

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discovered, the plaintiff brought an *indebitatus assumpsit* against *Wallis* for money received to her use, and had a verdict: And the court held, That *Wallis* being visibly her husband, the tenant was discharged; at least that the recovery against *Wallis* in this action would discharge the tenant. *Haffer v. Wallis, Hil. 6 Annæ, B. R.*

Lease of a house, excepting two rooms and a free passage to them. The lessee assigns, and the assignee disturbed the lessor in his passage thereto; whereupon the lessor brought his action. *Per Cur'*: The action lies; but if the disturbance had been in the rooms excepted, no action of covenant would have lain, for they were not demised; but where the lessee agrees to let the lessor have any thing out of the demised premises, as a way, common, &c. In such case covenant lies for the disturbance. *Cole's case, Hil. 3 W. & M. B. R. Salk. 196.*

Lessee covenanteth for him and his assigns to rebuild and finish the house within such a time, and after the time expired, the lessee assigned over the premises, the house not being built and finished. *Per Holt*, chief justice: The covenant will not bind the assignee, because it was broke before the assignment; *aliter* if it had been broke after, and the lessee had assigned before the time expired. *Grescot v. Green, Pasch. 12 W. 3. B. R. Salk. 199.*

Where a lessee for years sets up any thing for the convenience of his trade, such as stalls, coppers, &c. he may remove them at any time during his term, and they are seisable on a *Fi. Fa.* But what he does to compleat or beautify the house, as laying of hearths, setting up chimney-pieces,

pieces, &c. he cannot remove them, neither can they be taken in execution. *Pool's case, Mich. 2 Anna, Salk. 368.* If the lessee in the room of wooden or stone chimney pieces, &c. puts up marble ones, he may remove them before the end of the term, putting up such or as good as were there before.

And the law seemeth now not to be held so strict as formerly, and therefore if hangings, tapestry, and iron backs to chimnies can be taken away without prejudice to the fabrick of the house, they may, 2 *Str. 1141.* so tables, although fastened to the floor, furnaces, if not made part of the wall; grates, iron ovens, jacks, clock cases, and such like, although fixed to the freehold by nails or otherwise. 2 *Burn's Eccles. Law 648.*

The general rule of law is, that whatever is fixed to the freehold becomes part of it, and cannot be moved; but many exceptions have been admitted of late to this general rule, as between landlord and tenant, or between tenant for life, or tail, and the reversioner. *Tri at Ni. Pri. 4 to p. 33.*

C H A P. III.

Of Payment of Rent; Acceptance and Extinguishment thereof; Demands, Entries, Dates, Continuance, Limitations, and Determinations of Leases.

IT ought to be a principal care of a tenant, above all things, to provide his rent at the time of payment; whereby he may avoid much *slavery* and *knavery* of cruel biting landlords.

Land may be let by the year at so much as it is worth, and in the pleading aver it to be worth so much. 2 *Lord Raym.* 1160. *Arguendo.*

If a tenant be to pay his rent to his landlord at our *Lady-day* and *Michaelmas*, or within fourteen or fifteen days after either of the said feasts; in this case he is not bound to pay his rent until the last day limited for payment, for that is the legal day of payment, and the other before voluntary.

And if there be a clause, that if the rent be behind by the space of fifteen days (more or less) after any of the said days of payment, then the lease to be void; in this case, if the time before limited be fifteen days, then the tenant shall have thirty days after any of the said feasts to save his lease; but if the clause in the lease be, That if the rent be behind for the space of fifteen days next after either of the said *feast days* of payment, here the

the tenant hath but fifteen days only allowed to him: And so the diversity is to be noted in this case in the words of a lease, which with a very little and scarce observable alteration makes so much advantage for the tenant. *Hern's Law Conv.* p. 23. 10 *Rep.* 227. *Co. Lit.* 202.

Where there are special days of payment limited upon the *reddendum*, the rent ought to be computed according to the *reddendum*, and not according to the *habendum*: But where the reservation is general, as half-yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the *habendum*. 2 *Lord Raym.* 820. *Tamkins v. Pin-sent*.

If a man take a lease for years to pay his rent at our *Lady-day* and *Michaelmas*, or within fifteen days after either of the said feasts, and the landlord die after either of the said feasts, and before the fifteen days be out, the heir in this case shall have the rent then, for the first day is but voluntary, and the legal day of payment is at the end of the fifteen days: And if the tenant before that day pay the rent, such payment is voluntary, and not compulsory; but if payment be in the morning, and the landlord die at noon, it is good to give seisin: And though this payment be voluntary, yet it is satisfactory against the heir. *Hare and Savil's case*, *M. 7. Jac. in C. B. Brownl. Rep.* 2 *Par.* 273. *Hern*, p. 22, 23.

If a tenant for years be to pay his rent at *Michaelmas*, and to perform other covenants; and if he be bound in any obligation to pay his rent precisely at the day, he must in this case seek out his landlord to pay him; but if his obligation be only

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to perform the covenant in the lease, he may then tender his rent upon the land, (if no other place be by agreement appointed for the payment thereof) and it is sufficient, for the payment is of the nature of the rent reserved. *Manly and Jenning's case, Pasc. 10 Jac in C. B. Brownl. Rep. 2 Par. p. 276. Noy's Max. p. 80.*

Note; A man is not bound to pay an annuity without an acquittance; but a rent-service or rent-charge he is: And therefore in an action of debt brought against a man for rent due upon an indenture of demise of lands, he may plead payment without an acquittance. *Perk. Sell. 780. Pract. Reg. 495.*

Also, if he that hath rent-service or rent-charge accepts the rent due at the last day, and gives an acquittance for it, all the arrearages of rent due before are hereby discharged. *Co. Lit. 373. a. Hern's Con. 40. 3 Co. 66.*

Payment of money before the day appointed, is in law payment at the day. *Pract. Reg. 495.*

When one is to pay rent at a certain day, he hath all that day till night to pay it; but if it be a great sum, he must then have it in readiness so long before sun-set, as they that are to receive it may see to tell it, for they are not bound to tell it by candle-light. *See after.*

If a parson lets his glebe-lands to a layman, the tenant shall pay the parson tithe of that land besides the rent; for the tithe are of common right.

If a man let out by lease a stock of cattle or other goods, (as it is very usual now-a-days, to lease out silk stocking-frames to the weavers) and the rent to be paid at several days; if the rent in
this

this case be in arrear, the lessor cannot bring an action against the tenant or occupier thereof until all the days be expired : In like manner as it is in an obligation with condition for several payments, because these are personal contracts. But it is otherwise in case of a lease for years, which is a real contract; for there the landlord may have an action of debt against the tenant after every day of payment, if default be made, or he may distrain at his election. *Co. Lit.* 47, & 292.

If there be two joint-tenants, and they make a lease for years by parol or deed poll, and reserve rent to one of them, this shall enure them to both : But if it be by deed indented, it shall enure to him alone by way of conclusion. *Co. Lit.* 47. 8 *Rep.* 70, 71.

If an heir let a lease to a tenant for life, and reserves a rent, against whom the mother of the heir recovers her dower, and dieth, the tenant shall have the land again for his life, and the rent is revived. *Co. Lit.* 42.

If the successor of a parson or vicar accept the rent of a lease for years made by his predecessors, yet this acceptance is worth nothing, for the lease is void by death; but of a lease for life it is otherwise. *Pennant's case*, 3 *Rep.* 65; 66.

But if a bishop accept the rent upon a lease for years, he shall never avoid it; for it was but voidable only, and his acceptance hath now confirmed it.

If a man hath lands in the right of his wife, and he and his wife let these lands for years, reserving a rent, and afterwards the husband dies, and she before any day of payment takes another husband,

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husband, who accepts the rent, and dies, by this acceptance the lease is affirmed.

In like manner, if a man and his wife let the lands of his wife for years, rendering rent, and the husband dies; if the wife accept the rent it is a good lease. *Terms of the Law, Acceptance.*

But if a tenant for life lease lands for years and dies, the lease is void, and the rent which is reserved upon the lease is determined. And altho' he in remainder do accept the rent, yet his acceptance will not make it good; for when it is once void by death, no acceptance after will make it good.

So likewise if a tenant in dower lease for years and die, the lease is void, and the acceptance of the rent by the heir will not make it good again.

A lease for years may be confirmed for a time, or upon condition, or for a piece of the land; but if it be a frank-tenement, it shall enure to the whole absolutely. *Noy's Max. p. 78.*

Observe this difference between a lease for life and a lease for years: In case of a lease for life, though the conclusion of the condition be, That it will be void, yet acceptance of the rent due after the breach doth affirm it, and make it good again. *Pennant's case, 38 El. Co. 3. lib.*

If a parson let a lease for years of his glebe-land, if it be confirmed by patron and ordinary, it shall bind the successor, or else not. *Co. Lit. 300.*

If a lease be made to a man for the term of another man's life, and afterwards the lessor only of his meer motion confirmeth the land to his lessee for term of his own life, the remainder over in fee;

this is a good remainder in the law. *Doctor and Student*, l. 2. c. 20. f. 93.

If a man lets land for life or years, reserving rent, and do enter into any part thereof and take the profit, the whole rent is thereby extinguished, and shall be suspended during his holding thereof. *Leonard's Rep.* 110. *Godard's case*, *Mich.* 34. *El. C. B.* *Owen's Rep.* f. 10. *Hern's Law Conv.* p. 118.

In what case there shall be a revivor of rent, and in what not, *vide Lit. Rep.* 58.

In what case there shall be a suspension of rent, *Ibid.* *Vide Lord Raym.* 369. 2 *Lord Raym.* 1477. *Stra.* 763.

Where there shall be no apportionment of rent, *Id.* 61. And how the word *annuatim*, or yearly, shall be taken.

Note, That where two closes are in the same possession, the duty of fencing is extinguished, and shall not revive, though the closes come after into several hands. 1 *Vent.* 97. *Dyer* 295. *Poph.* 172. 1 *Cro.* *Baber and Bereman's case*.

Debt does not lie for a rent reserved on a lease for life upon 32 *H. 8.* c. 37. without shewing that the estate is determined. 2 *Lord Raym.* 1056.

If a lessee assigns over his term, reserving rent, it will be extinguished by releasing all demands. 1 *Vent.* 314. 1 *Mod.* 99.

But it was said, That a rent incident to a reversion would not be barred by such release. 1 *Vent.* 314. 1 *Sid.* 141.

Also it is said, That a man cannot release a debt by his will. 1 *Vent.* 39.

Now,

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Note. That where a fine is levied to a lessee for years, with an intent that he should suffer a recovery, his term is not drowned. *1 Vent. 195.*

But if tenant for life, with power to make a jointure, suffers a recovery, the power is extinguished. *Id. 226.*

If the tenant come to the landlord at any place upon the ground at the day of payment, and tender his rent to the landlord, it is good enough, and shall save the condition; and the landlord is bound to receive it, although it were not at the most *notorious* place, nor last instant of the day; for he may tender his rent at any time of the day, although the last instant be the legal time of payment. *Co. Lit. 202.*

But observe, by the way, That a tender of rent must be of the whole rent, without deduction of taxes or assessments, or any other charges; for stoppage is no payment in the law. *Trin. 23 Car. in B. R. Pract. Reg. p. 662.*

But *note.* That by the late acts for granting aids by land-tax, &c. the tenant is at liberty to deduct the land-tax, and tender the remainder, and this by the courts in *Westminster* is held to be a good tender. *Serj. Say. Rep. 79.*

If a man lets lands by lease for years to another, reserving rent of the lands to be paid at *Michaelmas* and our *Lady-day* or within fifteen days after, and for default of payment to re-enter; in this case it is sufficient and lawful for the tenant to tender his rent the last hour of the last day, if the money can be told in that time before it be dark; and so it is sufficient for the landlord to demand it the same hour. *Co. Lit. 202.*

Although the time of sun-setting is the time appointed by the law to demand rent, to take advantage of a condition of re-entry, and of tendering rent to save a re-entry, and of tendering rent to save a forfeiture, yet it is not due till midnight; for a man demands till sun-set, yet if after sun-set, and before midnight, he dies, his heirs shall have the rent, and not the executors; which proves the rent is not due until the last minute of the natural day. *Vide 1 Saund. 287.*

A man seised in fee ought to reserve the rent upon a lease to himself and his heirs; for that it appears, if a man seised in fee makes a lease for years, reserving rent to himself and his assigns, this rent is extinct after the lessor's death, because it was not reserved to the lessor and his heirs.

Lease by a tenant in fee, and rent reserved to the lessor, his executors, administrators and assigns, the words *executors and administrators* are void. *1 Vent. 162.*

So if a man seised in fee lease one acre of land, reserving 10s. rent to him and his heirs; and also lease another acre, reserving other 10s. rent to himself, without saying [and to his heirs] the heir shall not have the last rent, but it is extinct by the death of the lessor. *2 Saund. 268, 269.*

But if one seised in fee reserves a rent upon a lease for years *durante termino* to the lessor, his executors, administrators and assigns, and not to his heirs; yet, by a grant of the reversion from the lessor, the rent is well transferred to the assignee; and in such case the rent being transferred to the assignee, the law transfers also to him the covenant

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nant of the lessee for the payment of it as incident to the rent. 2 Saund. 369.

Vide the case of *Sachevirel* versus *Frogat*, 2 Lev. 13. where the rent was reserved to him, his executors and assigns, the heir brought an action; and upon a demurrer it was argued for the defendant, That the rent determined by the death of the lessor. But the chief justice said, that the rent, being reserved to him, his executors and assigns, would continue and go to the heir, for the apparent intent that it should endure after his death; otherwise it could not go to the executors, and that without the *durante termino*. But that it is otherwise where the rent is reserved to him, or to him or his assigns; and, after several arguments, judgment was given for the plaintiff.

Now if a man makes a lease for years, reserving rent generally, and does not say to whom, the law will make construction, that it shall be paid during the time, to them who have the reversion, and to whom from time to time it shall appertain. 2 Saund. 369.

Where a father is seised in fee, if he and his son and heir apparent, by indenture make a lease for years, to commence upon the death of the father, rendering rent to the son by name, although the son be heir to his father, he cannot have this rent as heir, because the rent was not reserved to the heir; and he cannot have it by the reservation of the lease, because he was a stranger to the land, and had nothing in it at the time of the lease made. 2 Saund. 370.

If the lessor, seised of a reversion in fee, demise the reversion expectant upon an estate for years to a stranger for life, reserving rent when the rever-

tion shall happen; in such case he shall have no rent during the continuance of the term for years; for a reservation of rent shall be construed most strongly against the lessor himself. *2 Saund. 168, 169.*

If a lease be made with this proviso, That in case of non-payment the landlord to re-enter; here, if the landlord distrain, he may not re-enter, but he may accept of the rent, and yet re-enter; but if he do receive the next rent again, then he cannot re-enter, for that establisbeth the lease. Entry into an acre of land in the name of the whole, is a good entry, if the land do all lie in one county. *Co. Lit. 211.*

In a lease for years, if the lessee covenant, That if he or his executors or assigns do alien, that then the lessor shall re-enter, and afterwards he makes his wife executrix, and dies, and the widow marries again, and her second husband aliens; in this case the lessor may re-enter, because the second husband is assignee in the law.

If a man make a lease for term of years, yielding to him and to his heirs a certain rent, upon condition, That if the rent be behind and unpaid by the space of forty days after any of the days of payment, that then it shall be lawful to the lessor and his heirs to re-enter: And after the rent is behind forty days, and is demanded by the lessor, and is not paid, the lessor dieth, and his heir enters; in this case his entry is lawful; but if the lessor had died after the feast-day, and before the fortieth day, so that he had not demanded the rent, and his heir had demanded the rent at the fortieth day, and for non-payment he re-enters; in

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in this case his re-entry is not lawful. *Doffor and Student, l. 1. c. 20. f. 35.*

If a lease be made to *H.* for one and forty years, if he live so long; and if he die within the aforesaid term, that then the wife of the aforesaid *H.* shall have it for the residue of the said years, this limitation is void; for if *H.* die the term ends, and his wife shall have nothing in it. *Dyer 254.*

If a man lets all his meadow in *D.* containing ten acres, if there be twenty acres of it, all passes in this case. *Dyer, f. 80.*

If lessee for years make a feoffment, the lessor being upon the land when livery was made, this is a good feoffment, the law adjudging the lessee in possession, and livery ought always to be given of the possession, and therefore he that hath the possession must make the livery. But if the lessor makes the livery himself, the lessee being upon the land, this livery is void, because the lessor cannot give possession when the lessee is there. *Cro. Eliz. 321. 322.*

It is said, one may give authority by parol (or word of mouth) unto another to take livery or seisin of lands for him, and that if such livery and seisin be taken accordingly, it is good. *Pract. Reg. 398.*

If a deed of feoffment be made of land, *habendum a die datus*, and the next day after the date of the deed the feoffee give livery and seisin of his land, this is a good livery and seisin; but that if this livery and seisin were made by attorney, it is said it will operate nothing. *Vide Hob. 314. Pract. Reg. 398.*

A thing that is to take effect *a die dat* is not to take effect until the next day after the deed bears date;

date; but where it is *habendum a dat.*, or a *consecratione indentura*, there it commenceth presently. *Pract. Reg.* 398.

Ejectione firma of a lease made by *Smith*, a prebend, to *Bole* (the defendant); upon a special verdict, the case was, The said prebend was usually let with the exception of all crab-trees, and such like trees, rendering rent 17*l.* *per Annum*. Upon 8 *August* 6 *Jac.* the prebend made a lease of the said prebendship, omitting the exception, *habendum a die consecrationis*, for three lives, rendering the antient rent, and made livery 9 *Sept.* 6 *Jac.* and whether this was a good lease to bind the successor by the statutes of 13 *Eliz.* and 32 *Hen.* 8. was the question. First, whether this lease *habendum a die consecrationis*, and livery made after, be good or not? Resolved, that it was; for the livery being made after the day, not working futurely, was good enough. Secondly, whether this exception of the trees, being in all former leases, and omitted in this lease, makes it void? Resolved, that it was void; for there being more let than there was antiently, the trees, and the profits of the trees, and the soil itself, is excepted by this exception, so as every successor cannot have the benefit of boughs and fruits yearly renewing; and the soil itself, whereupon they grow, is excepted. But by this new lease the trees and profits are let, and the soil itself; and so more being let than antiently, it is not within the *Stat.* 32 *H.* 8. and it is void by the *Stat.* of 13 *Eliz.* for it is not the antient rent, where there be more let than was before: Wherefore it was adjudged for the plaintiff. *Hil.* 15 *Jac.* 1. *Smith v. Bole, Cro. Jac.* 458.

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If a man make a lease for years, and afterwards make a deed of feoffment, and delivers seisin, if the lessee be upon part of the premises, and neither know nor assent to it, yet the livery is void; for though the lessor hath the freehold and inheritance in him, yet the possession is in the lessee; but if the lessee be absent, and hath neither wife, children or servants (though he hath cattle) upon the ground, the livery shall be good. *Co. Lit.* 48.

If a lease be made to hold from the day of the making, or from the day of the date, or from the date, the lease shall begin the day after it is delivered.

A lease beginning from henceforth shall be accounted from the day of the delivery, and from the making shall be taken inclusive from the day of the making. The day of the delivery must be taken inclusive, and is the first day of the term. If from the day of the date, or day of the making, then the day of the delivery shall be exclusive; *aliter* if from the date, and it is delivered the same day. 14 *Eliz.* *Dyer* 307.

If the *habendum* of a lease be for a term of one and twenty years, without mentioning when it shall begin, it shall then begin from the delivery. So if an indenture of lease bear date upon days impossible, as *Feb. 30.* or *March 40.* there being no such days in our account; in this case, if the term be limited to begin from the date, it shall take effect and beginning from the delivery, as if there had been no date at all. *Co. 1 Par. Inst.* f. 6. *Co. Lit.* 46. *Hern's L. Conv.* 15, 131.

Vide 1 Vent. Rep. 137. That a lease without any date specified, or an impossible date, as from 40 *Septemb.* shall commence presently.

So a lease made to begin from the end of the lease misrecited, shall commence presently. 1 *Ven.* 83. 1 *Lev. Rep.* 234.

A prebendary made a lease for life to hold from the date, and livery made the same day; it was objected, that it ought to commence from the day of the date, and so livery given the same day was void: But the court at length held it good, and gave judgement for the defendant.

A lease is made to commence after the death of *J. S.* his son, without issue; *J. S.* hath issue and dies, and then the issue dies without issue, the lease commences; for issue being a word collective, whenever the issue fails the term commences.

If lands descend to an heir, he may make a lease thereof before his entry into the same. If a man makes a lease to-day to one for ten years, and to-morrow makes another lease of the same lands to another person for twenty years, this second lease shall be good after the first is expired, for so many years as remain therein to come. *Noy's Max.* p. 67.

If a man makes a lease to another for one and twenty years, and after another lease to commence from the end and expiration of the said term of years, and after the first lease is surrendered; in this case the second lease shall commence presently upon the surrender. *Co. Lit.* 45.

But if it had been made to commence from the end of the said one and twenty years, there, though there had been a surrender, yet it should not have commenced till the term had been out; so that by this you may observe, the law puts

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puts a distinction between a term of years and a time of years.

And by 3 *Leo.* 284. an estate vests immediately after a surrender made, before acceptance or agreement; but that it devests by refusal afterwards.

And so by 2 *Vent.* 199. noted, that it was said, That no surrender of an estate can be perfect without acceptance by the surrendree. *Thompson v. Leach.*

But that judgment was afterwards reversed in parliament; so that it appears that a surrender devesteth the estate immediately before express assent of the surrendree. *Idem* 203.

A lease made to commence after the end of another, and there is none, it shall commence presently.

If a man lets land to another, to hold till the lessee hath levied twenty pounds; this is a good lease, notwithstanding the incertainty.

Bracton saith, That every lease must have a certain beginning and ending; *Quia id certum est quod certum reddi potest.* Yet you see by the case before, this rule is contradicted, so that it holds not always, although in the generality it doth.

For if a man make a lease to another for so many years as *J. S.* shall name, although this be uncertain at the beginning, yet when *J. S.* hath named the years, it is then good for so many years as he names.

So likewise, if *A.* be seised of lands in fee, and do grant to *B.* that when he pays him twenty shillings, that then from that time he shall have and occupy the land for one and twenty years, and after *B.* pays unto *A.* the twenty shillings, this is
F 8 a good

a good lease for one and twenty years from that time. *6 Rep. 34, 35. Co. 1 Par. Inst. fo. 45.*

If a parson make a lease of his glebe for so many years as he shall be parson there, this is void, because of the uncertainty thereof; for the parson's time there terminates with his life, than which nothing is more uncertain.

If a lease be made for one hundred years, if *A.* and *B.* live so long, in this case, if either of them die, the lease is ended.

If an infant, who is seised of lands in socage, make a lease at his age of fifteen years, this is good, and shall bind him. *Co. Lit. 45.*

If a tenant in fee marry a wife, and make a lease of his lands for years, and after die, and the wife is thereof endowed, here she shall avoid the lease; but after her death it shall be in force again against the heir. *Co. Lit. 46.* This is meant of a beneficial lease, not of common leases or rack-rent, &c.

If a man have a term of years in the right of his wife, if she die, it remains to him; but if she survive him, it remains to her, and not to his executors, without he dispose of it in his lifetime. *8 Rep. 49.*

If a man licence another to enter and occupy his land, this is a good lease for years in law. *Brownl. 2 Part. p. 256.*

A lease for years, although it be never so long, cannot be intailed, because it is a chattel, which cannot be turned into an inheritance. *Style Pract. Reg. p. 197.*

If a man seised in fee-simple let a lease to another, to have and to hold the same lands for term of life, and do not mention whose life, it shall be taken

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taken for the lessee's life, because the act of every one shall be taken most strongly against himself.

But if a tenant in tail let such lease without expressing whose life, it shall be taken for the life of the lessor, because the implication otherwise would make tenant in tail a wrong doer.

If a joint-tenant make a lease for years of his part, though the lessee never had possession, or though it be to begin at a day to come, and the joint-tenant that made it die before the day, yet the survivor shall be bound by the lease, for the lessee hath a present interest. *Co. Lit.* 185.

If two take a lease for their lives, and make partition, either of them dying, his part immediately reverts to the lessor.

If there be two joint-tenants for life, and one of them makes a lease for eighty years, to begin after his death, and after dies, this lease is good against the survivor. *Goldsb. Rep.* 187.

If a lease be made to the husband and wife, yielding a greater rent than the land is worth, if the husband die, the wife after the husband's death may refuse the lease, to save her from the payment of the rent: But if the husband over-live the wife, and then make his executors, and dies, if they have assets, that is, if they have goods sufficient of their testator to pay the rent, they cannot refuse it: But if they have not goods sufficient of their testator to pay the rent to the end of the term, if they relinquish the occupation, they may by special pleading discharge themselves of the rent and the lease. *Doctor and Student*, l. 2, c. 33.

If a man makes a lease for years, and afterwards the lessor enters upon the land let before the term

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is expired or determined, and doth make a lease of these lands to another; this second lease, it is said, is a good lease until the first lessee doth re-enter, and then the first lease is revived, and the first lessee is again in possession by virtue of the first lease. *Pract. Reg.* 403.

Where a lease for years is made by the words, demise, grant, and to farm let, the lessee is not in possession so as to bring trespass, &c. until an actual entry. But where the words, bargain and sell, (for a consideration of money) are in, altho' but for a shilling, the party is in possession presently upon executing the deed so as to bring trespass, &c. *Ibid.*

If I let lands in which are mines or trees, I cannot enter to take the trees or mines, but am a trespasser, unless I do reserve such a privilege to myself when I let the lands.

But if a lessor do come upon the ground leased, he is no trespasser, for it shall be intended that he came to see if waste were done.

It is noted, That if a man opens a mine in his own land, he may dig and follow the vein under another man's ground; but if the owner dig there also, he may stop his further progress. 2 *Vent.* 342.

Concerning leases and grants made of the duchy of Cornwall, vide Stat. 6 *Anna.* c. 25

If a tenant for years happen by any casualty to lose his lease, yet he shall not lose his term in the lands let by such lease which is lost, if it can be proved that there was such a term let to him by indenture, and that it is not determined.

When by an order confirmed by act of parliament, That an indenture shall be vacated and cancelled,

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cancelled, it is not intended that the indenture shall be void *ipso facto*, but that it shall be made void by cancelling of it, and until the cancelling the estate granted by the indenture continues. 1 *Saund.* 201.

An insensible clause does not make the residue of a deed vitious, which is sensible of itself. 1 *Saund. Rep.* 320.

All feoffments, gift, grants and leases made by duress of imprisonment are voidable, and that not only by the parties themselves, but by their heirs, and those who have their estates. *Perk. Sect.* 16. *Co. on Lit. f.* 253. b.

If a layman who is unlearned, and cannot read, be bound to seal a lease, bond, or other writing to another; in this case he need not do it, without there be some there to read them to him, if he request it, and in such language as he understands: And if it be read amiss to him, or declared contrary to what it is, so as the illiterate man is thereby deceived; as a bond of twenty pounds is read as of twenty shillings, or feoffment of two acre is read as of one; in such case he may very well plead, that it is not his deed; but if he request not to have the writing read, though it be contrary to his intent and meaning, yet it shall bind him if he seal and deliver it, for it was his folly that he did not desire to have it read. *Co. 2 Rep. f.* 3. &c.

Where one makes a lease, rendering rent to be paid at a place off from the land, a demand on the land is not sufficient, but it must be made at the place appointed. *Trin. 5 Jac. C. B. Ventris's and Farmer's case, 1 Brownl.* 96.

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The demand ought to be at the setting of the sun on the day of payment, and at the most notorious place. *Pasch. 3 Jac. C. B. The Dean and Chapter of Chichester's case, 1 Brownl. 138.*

If the lessor would take advantage of a re-entry for non-payment of rent, he, or the person he impowers to demand it for him, must take care not to demand a penny more or less than his due, and must shew the certainty of his rent, and when it was due, or the demand is not good, and no re-entry shall be given unless the demand be precisely and strictly followed. *Mich. 31 Eliz. C. B. Falican and Winsor, Leon. 35*

Where a lease is made of lands at will, rendering rent, the lessee cannot determine his will two or three days before the rent is payable, and so defraud the lessor of his rent, any more than the law will allow the lessor to determine his will, after the lands are sown; but as the one shall have the emblements, the other shall have his rent: So that the lessee cannot determine his will but at the rent-day; unless he pays rent until the next day of payment after his departure. *Siderfin 369.*

Where a tenant is held by force out of his farm or tenement by soldiers in time of a rebellion, a court of equity cannot relieve him, but he must pay his rent: So where his grounds are overflowed that he can receive no profit by them, he must pay his rent notwithstanding, nor can he be relieved in equity. *Sir John Harrison against the Lord North, Pasch. 19 Car. 2. Chan. Cases, 1 Part, p. 83.*

A lease was made with a condition of re-entry for non-payment of rent; the lessee paid his rent

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to the lessor, who accepted it and put it up; but afterwards finding bad money amongst it, he refused to carry it away, and entered for the condition broken. It was adjudged that this entry was unlawful, for his having once accepted the rent, bars him from taken any advantage. *Wade's case, Trin. 43 Eliz. C.B. R. 406.*

If a lease be made upon condition that the lessee shall do no waste, and he does commit waste, if the lessor afterwards accepts the rent, he cannot enter; but if the condition had been, if he committed waste, that then his estate should cease, there no acceptance of the rent could make the lease good. *Mitch. 29 Eliz. B. R. Godb. 47.*

A lease was made of lands in Ireland, with a covenant for payment of the rent in London. And it was resolved, That an action of covenant cannot be brought in England for rent reserved on a lease of lands in Ireland. *Barker v. Damer, Hil. 2 W. & M. B. R. Show. 191. Salk. 80.*

The words *yielding and paying* are an express covenant for payment of rent. *2 Sid. 266.*

In debt for rent upon a lease at will, the plaintiff must shew the defendant occupied the premises; for the rent is due only in respect of the occupation, and therefore it must appear to the court when the lessee entered, and how long he occupied: But in debt for rent upon a lease for years, the plaintiff need not set forth any entry or occupation; for if the defendant neither enters nor occupies, he must pay the rent, it being due by the lease or contract, and not by the occupation.

Bellasis v. Burbrick, Mich. 8 W. 3. C. B. Salk. 209. 3 Salk. 136. Lord Raym. 170, 280.

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In ejectment, on a condition of re-entry for non-payment of rent, the confession of lease, entry and *ouster*, is sufficient, and proof of actual entry and *ouster* is not necessary. *Little v. Heaton*, *Salk.* 259.

Covenant on indenture for non-payment of rent; the plaintiff declares that he was seised of tithes, and by indenture demised them to the defendant, rendering rent, and the defendant covenanted to pay it, and he assigned his breach in non-payment of so much; and the defendant pleaded eviction. The plaintiff demurred. Judgment for defendant, because it is a rent, and the eviction is a suspension of it, and therefore a good plea. 1 *Lord Raym.* 77. *Dalston v. Reeve*.

A lease is made for years to *E. G.* reserving rent. *G.* enters, and dies possessed; *S.* his executor, 4th *June* 1658. assigns to *P.* and *P.* the 4th *June* 1689. assigns to *J. M.* and for half a year's rent due on the 1st of *January* 1689. Covenant was brought against *P.* The sole question was, if notice of the assignment should be given to the plaintiff; and adjudged maintainable by three justices, *contra Henris*. But this judgment was afterwards reversed in *B. R.* upon the point in law, *viz.* that notice of the assignment to the plaintiff was not necessary; for by the assignment the privity of estate was gone, and there was nothing to support the action against the defendant, he being only assignee. 2 *Ven.* 234. *Tovey v. Pitcher*.

Judgment in *C. B.* reversed in *B. R.* and the court held, that there was no privity of estate or contract between the plaintiff and defendant, and these failing, the plaintiff's action must fail likewise,

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wife, because that must be founded either upon the one or the other; and as to an objection that it might be assigned to a beggar, the court answered, that it was the lessor's own fault and folly to take the first assignee for his tenant, and that the lessor was not without remedy; for that he might bring covenant against the lessee's executors, or he might distrain on the land. *Shew.* 340. *S. C.* in *B. R.* and judgment in *C. B.* reversed. 4 *Mod.* 71. *S. C.* in *B. R.* and that judgment in *C. B.* reversed. *Carth.* 177. *S. C.* adjudged in *C. B.* but reversed in *B. R.* 12 *Mod.* 23. *S. C.* and judgment in *C. B.* reversed, and *nil dictum* as to point of notice. *Camb.* 192. *Richards v. Ferrey*, *S. C.* and by *Holt* chief justice assignment by assignee discharges him; because he was only chargeable as having the land; and there is no more reason for his giving notice to the lessor of his assignment over, than of the assignment to him by the lessee; and judgment in *C. B.* was reversed. *S. C.* cited lord *Raym.* *Rep.* 368. and *Hob.* chief justice, said, that that judgment of *C. B.* was reversed in *B. R.* by the opinion of the whole court, which reversal was grounded upon the reason of *Walker's* case, 3 *Rep.* 23, &c.

In debt for rent against the defendant as assignee of a term, he pleaded that he had made a further assignment to one *Reed* before the time for which the rent was demanded. To which the plaintiff replied, *non assignavit*. And on the trial it appeared, that the defendant, being weary of the assignment he had taken, employed a person to find him one who would take it off his hands; and *Reed*, a poor woman, then a prisoner in the *Fleet*, was prevailed.

vailed on to accept it; and *Nash* in consideration of 5s. (which it appeared he lent her for that purpose) made a formal assignment. The defendant insisting that this was not proper evidence on *non assignavit*, but that the plaintiff should have replied *per fraudem*; the chief justice held, it could not be gone into on this issue, according to the case in *Hob.* 72, 166. The plaintiff became nonsuit.

And now a new action being brought, and fraud replied; it was debated, whether this was to be considered as fraudulent or not; and the chief justice directed the jury to find for the defendant. He said the defendant could not be charged upon the privity of estate, which was destroyed as against him by the legal assignment to *Reed*: and it was the folly of the plaintiff to discharge the original lessee: That *Reed's* being a beggar did not alter the case, as was said in *Pitcher v. Tovey*, *Salk.* 81. & *Mod.* 71. He grounded his opinion chiefly on two modern cases in chancery, where this had been determined to be no fraud. The first was *Valliant v. Dodimead*, 2 May 16 *Geo.* 2. and *Huddle v. Hawkshy*, 4 February 1744. upon the foot that an assignee ought not to be chargeable any longer than he occupies the premises.

This being merely a point of law, the chief justice told the jury, they must find for the defendant: which they were very unwilling to do, and therefore, to prevent their going contrary to his opinion, I suffered a nonsuit. *Lakeux v. Nash*, 2 *Stra.* 1221.

The plaintiff claims under a term for years which originally belonged to one *Herbert*, and after having been granted to different persons, at last

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last vested in one *Charles Grake*, his residuary legatee, and one *Sedgewick* his executor: In *May 1727*. *Susan Grake* created a new term out of the old by granting an under-lease to *Richard James* for thirty-six years, rendering the rent of 70*l. per Annum*. The executor of *Charles Grake* did not join in this lease, and therefore only the equitable interest in the houses passed by it. In 1728. *Richard James* made a mortgage of these houses to *Valliant*; afterwards, on the 31st of *May* in the same year, *Susan* or her representatives by indenture assigned to *Valliant* a term of thirty-nine years and a half, together with another reversionary term of twenty years in these premises, so that *Valliant* became not only mortgagee under *Richard James*, but was intitled likewise to the rent of 70*l. per Ann.* which before belonged to *Susan*; *Sedgewick* was no party to this deed: Soon after the execution of the last deed *Richard James* built some new houses upon the premises, in consideration of which *Valliant* agreed to pay him a rent of 20*l. per Annum*, and, in order to secure the payment of this rent in 1730. *Valliant* demised the premises to *Rouse* in trust, to pay 20*l. per Ann.* to *Richard James*, and as to the residue for the benefit of *Valliant*.

The consequence of these things was, that, as matters then stood, *Valliant* would have had a remedy against *Richard James* for the 70*l. per Ann.* and *Richard James* would have been intitled to a deduction of the 20*l. per Ann.*

In *July 1731*. *Richard James* makes an assignment to *Dodemede* of his equity of redemption in the thirty-six years term, and also of the rent of 20*l. per Ann.* by way of mortgage for securing
300*l.*

300*l.* lent by *Dodemedé*: In the mortgage deed was an exception of the rent of 20*l.* *per Ann.* and likewise of four houses which *James* had lately built.

On the 17th of *July* 1733, other sums were advanced by *Dodemedé* to *Richard James*, amounting in the whole to 1200*l.* or 1400*l.*

In a short time after *Dodemedé* enters into possession as mortgagee, and, whilst he was so possessed, paid the rent of 70*l.* *per Ann.* to *Valliant*.

In 1737, a fire broke out which consumed five of the houses, but *Dodemedé* had insured some of them.

About this time *Dodemedé* made a proposal to *Valliant* to surrender the premises to him, and in order to induce him to it offered, that he should have the insurance money, amounting to 250*l.* and that he would sell him the rent of 20*l.* *per Ann.* for 300*l.* and that, if he would not agree to do it, he would assign the premises to any body.

Valliant rejected this proposal without making any on his side; and applying to the fire-office for the 250*l.* insurance, upon *Dodemedé*'s refusing to rebuild the houses which were burnt, and *Valliant*'s agreeing to do it, the fire-office paid *Valliant* the money accordingly.

Dodemedé took a good deal of pains to find out a person who would accept of the assignment, and at last prevailed upon *Lemar*, a prisoner in the *Fleet*, for the price of four guineas to accept of it, and *Dodemedé* made an assignment of it accordingly: From that time *Dodemedé* never received any part of the profits of these houses.

The bill is brought by *Valliant* and others against *Dodemedé* and others, praying, amongst other

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other things, that the assignment made by *Dodemede* to *Lomax* might be set aside as fraudulent, and in consequence of it that *Dodemede* should be obliged to pay the rent of 30 *l.* per Ann. to *Valliant*.

Lord chancellor: As to the arrears of rent incurred before the fire, it is extremely plain, that *Dodemede* is liable to make satisfaction to the plaintiff, because during that time he was in possession of the rents and profits of the estate; however, as he has made an assignment to *Lomax*, *Valliant* has no remedy for these arrears at law, and is under a necessity of coming into this court for its assistance.

The next question is, whether *Valliant* is intitled to the aid of this court to recover the arrears which incurred after the fire, and before the assignment to *Lomax*; and though it is more doubtful than the other question, yet I am of opinion that he is intitled, for, notwithstanding the accident of the fire, *Dodemede* continued in possession of the houses which were unburnt, and received the rents of the under-tenants, and was certainly liable therefore at law; and as *Valliant* cannot dis-train on account of the assignment to *Lomax*, he ought to have the assistance of this court.

But there is a great difference in regard to the arrears incurred since the assignment to *Lomax*; and it would be going too far if the court was to assist the plaintiff against *Dodemede* in this respect, for the law says an assignee of a term may assign, and thereby get rid of his subsequent rent, and the covenants which run with the land; and if it be so at law, it is reasonable he should in equity, which in cases of this kind follow the law; though

though indeed it is true, that in some sort of assignments made by tenants the court has interposed. *Vide Tracle v. Coke, Vern. 165. and Philpot v. Hoar, Nov. 26, 1741.*

But these cases are distinguishable from the present, and particularly the last, for the great point there was, that the party to whom the assignment was made, or pretended to have been made, acted really as an agent only for the assignor; there was no proposal, as in the present case, to surrender up the premises to the landlord, and if there had, the court declared they should not have relieved.

Where there was an express offer by *Dodémède* to surrender the premises to *Valliant* on certain terms, which by no means appear to be unreasonable.

Besides too here was a general calamity, and an unforeseen one from fire; and as *Dodémède* lent to *James* 1300*l.* or 1400*l.* upon the estate which he is likely to lose, it would be extremely hard to oblige *Dodémède* to pay the 70*l.* rent, since the assignment to *Lomax*, especially as *Valliant* has received the 250*l.* from the fire-office, notwithstanding *Dodémède* made the assurance.

The last question relates to the 20*l.* per Ann. which was agreed to be paid by *Valliant* to *Richard James*, whether it ought not to be deducted out of the 70*l.* per Ann.

I am of opinion that it ought, whoever is intitled to it, the representative of *Richard James*, or the defendant *Dodémède*; for it is the ordinary direction of this court, that such sort of demands should be set one against the other. 2 *Atk. Rep.* 546. Pl. 322. *Valliant v. Dodémède.*

Lord

Lord Chancellor,

Monday the 4th day of
February 1744.

Stray pro Quid. The scope of the plaintiff's bill is to have an account of the rents and satisfaction for our damages, and to have the assignment of the lease to *Levy* delivered up, or set aside.

Lawson pro defendant Hawksby opens his answer.

Umfreville pro defendant Levy opens his answer.

Mr. Chute pro plaintiff.

William Hartford read, *James Kelly* read, *Oliver Acton* read, *Samuel Marriage* read.

Mr. attorney general for defendant Hawksby.

William Smith read.

The bond from *Francis Hawksby* to *Nathaniel Underwood*, dated the 20th of *March 1720* read.

Cur. Let the plaintiff's bill be dismissed without costs, and Let the plaintiff deliver up to the defendant *Hawksby* the bond given by him to *Underwood*, dated the 20th of *March 1720*; and the same was delivered up in court accordingly.

C H A P. IV.

*Of Corn sown, who shall have the Crop. Of
Esters, and Trees blown down. Of Dis-
tresses; what Things may be distrained, and
how used: Who may take a Distress; for
what Cause, when, and where.*

IT is an usual saying, and generally received opinion, that he that sows must reap: But as there is no general rule, without some exception, so this holds not always, that he that sows shall reap.

But touching the sowing of corn, if the tenant be outed, or his term ends before it be ripe, who shall have the corn I have already set down in the first chapter under the title of *Tenant at Will*: For if a tenant at will sow his land, and the landlord put him out before the corn be ripe, he shall have liberty to reap and carry away his corn, because he knew not when his landlord would put him out.

But it is contrary with a tenant who hath a lease for years; for if his lease be out before the corn be ripe, his landlord shall have it, because he knew the end of his lease: Wherefore if he sowed, it is in his own wrong, unless there be a covenant in his lease between the lessor and him, that he shall have his way-going crop. *Vide antea.*

If

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If lessee for years at the end of his term leaves corn upon his land, the lessor cannot put in his cattle to eat it. *Lord Raym.* 189. *arguendo*. This must be understood of corn severed.

But if a tenant at will sets roots, or sow hemp or flax, or any thing that brings in any yearly profit; if after the planting the lessor out him, or if the lessor die, yet the tenant or his executors shall have the crop. But it is otherwise if he plant young fruit-trees, or other young trees, as oaks, ashes or elms, or sow the ground with acorns; in this case, if the lessor out him, he shall have none of these, because these yield no yearly profit at present.

Where an action lies against such as hinder taking away his emblements, as corn growing, grass, fruit of trees, hemp, flax, &c. *Co. Lit.* 56. *Keilw.* 125, 160.

If a tenant for life soweth the ground, and die before the crop be ripe, his executors shall have it, and so they shall have grass if it be cut; but if it be *unmown*, they shall not have it, for that is part of the inheritance until it be severed.

Every tenant that hath an estate incertain, shall have the corn sown by him, though he be outed before it be ripe.

If the lessee sow the land, and then surrender his term, the lessor, or he to whom the surrender is made, shall have the corn; so if a man enter for condition broken, he shall have the corn, and not he that soweth the corn, for his entry over-reacheth the estate of the other. *Godb. Rep.* 189. Because it is either by the party's own act or mis-feasance,

If a lessee for years sow the land, and then commits waste, and the lessor recovers the land in an action of waste; here the lessor shall have the corn sowed. *Park. Sect. 515. Corwell's Inst.*

152.

If a tenant for life lease for years, and the lessee sows the ground, and before it be ripe the tenant for life dies; yet notwithstanding the lessee for years shall have the corn, or his executors if he be dead. *Co. Lit. 55. b.*

Tenant for life, remainder in fee; tenant for life leaseth for years; the lessee is ousted by a stranger, and the stranger sows the land, and the tenant for life dies; in this case it was resolved, that the corn of right belonged to the lessee of tenant for life, and not to the stranger, nor him in remainder. *Goldsb. Rep. 143. pl. 60. 5 Co. 85.*

If *A.* taketh a lease of land for the life of *B.* and sows the land, and before the corn be ripe *A.* dies, yet, notwithstanding *A.* shall have the corn, for his estate was determined by the act of God; and the reason why a man which hath an uncertain estate shall have the corn, is, for that he hath manured the land; and therefore it is reason, that he that laboureth should reap the fruits of his labour: Therefore if a man make a lease for life of ground sowed, and before severance the lessee dies; in this case the lessor shall have the corn, and not the executor of the lessee for life, for the corn came not of the manurance of their testator. And if lessee for life sow the land, and then assign over his interest, and dies before the corn be severed; here he in reversion shall have the corn, and not the assignee of the lessee for life, *Goldsb. Rep. 144.*

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Q. For in both cases they seem to have purchased the right of the person sowing it, and stand in the same equity, and the true reason of giving emblements to lessee, where the landlord's estate is uncertain, is for the benefit of the common-weal, lest the precariousness of such possession might make the tenant leave his lands unsown.

If a man by his will devise lands sowed to one for life, and after his decease the remainder to another for life, and the first tenant enters and dies before severance, and he in remainder enters; now he shall have the corn; and not the executors of the first tenant for life. *Goldf. Rep. 144.* And this stands with the reason of my *query*, tho' the remainder-man has the corn sown; for a purchaser under a devise has not the same equity as the purchaser for valuable consideration, and the testator was willing to give each of them the land with all its benefits, *diversis temporibus*.

If a man be seized of land, in right of his wife, and sow the land, and die, his executors shall have the corn; but if they be joint-tenants of the lands, and the husband soweth the ground and dieth, the wife shall then have it on account of the survivorship. *Co. on Lit. f. 55. b. Perkin's Sect. 518. Dyer 326.*

And if a woman, who is tenant for life or in dower, take an husband, and he sow the land, and before it be ripe she dies, yet the husband shall have the corn. *Covel's Inst. 141. Swinb. Sect. 6. p. 163.*

And so if the husband let the lands of his wife for years, and the lessee sows the lands, and before severance the wife dies, yet the lessee shall have the corn, or his executors, if he be dead.

The like law of lessee for years of tenant by the curtesy, when tenant by the curtesy dies before his lessee's corn is ripe and severed. *Cowell's Inst.* p. 141.

If a woman who holds lands *durante viduitate sua* sow the ground, and then takes husband before the corn be severed; in this case the lessor shall have the corn. And so if tenant at will sow the land, and then will occupy the land no longer, he shall then lose the corn; and the reason hereof is, because the determination of their estates grew by their own act. *Co. Lit.* 55. b. *3 Co. Rep.* 119.

But if such a woman, who holds lands *durante viduitate sua*, lease the same lands to another, and the lessee sows the land, and then the woman takes husband, which determines her estate, yet notwithstanding the lessee shall have the corn. So if tenant for life lease for years, and the lessee sows the lands, then tenant for life commits a forfeiture, so that his lessor enters, yet the lessee of tenant for life shall have the corn; but if tenant for life sows the lands, and then commits a forfeiture, and the lessor enters, here he shall have the corn, and not tenant for life, because the determination of his estate grew by his own act. *Goldsb. Rep.* 189.

A lease made by the husband of the wife's land in his own name only, is void after his death; but if the lessee have sown the land, he shall have the corn. *Noy's Max.* 70.

If there be a landlord and tenant, and the land is recovered by a title paramount against the landlord; in this case, if the tenant have sowed the land,

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land, he that recovered shall have the corn, if it be not severed before judgement; but if a common recovery be had against the landlord in a writ of entry *en le poss*, or in any other writ by a false and feigned title, in such case the lessee shall have the corn. *Co. Lit.* 142. *Perkins* 829. 513.

If an abator after the death of the ancestor, enter and sow the land, and after the right heir doth enter; in this case the heir shall have the corn. So if a disseisor sow the land, and then the disseisee entereth upon him, or recovereth in an assize before the corn be severed; in this case the disseisee shall have the corn; but if it were severed before the entry or recovery, though it remain still upon the land in sheaves or cocks, there the disseisor shall have it. But it is otherwise in the case of trees severed from the land; for if they be not carried off the land before the disseisee's entry, he shall then have them. *Goldsb. Rep.* 144. *Park. Sect.* 519.

If a widow have land assigned to her by the sheriff for her dower, and this land is sowed with corn, here she shall have the corn. *Vide Park. Sect.* 521. 15 *Eliz.* *Dyer* 319.

Note, That the statute of *Merton*, c. 2. which giveth, *Quod omnes viduae de ceteris possint legare blada*, &c. as unto this point, is but in affirmance of the common law; for if tenant in dower soweth the land which she holdeth in dower, and dieth before severance, her executors shall have the corn, if she do not devise it to another; and so was the law taken in the 4th of *H. 3.* *Devise* 6. which was sixteen years before the making of the statute of *Merton.* *Park. Sect.* 522. *Sec 2 Part. Inst.* 83.

If tenant in tail sow the land, and give me the corn, and die before I have severed it from the land, yet I may afterwards sever the same and take it, for that the executors of the tenant in tail should have had it. *Perk. Sect. 59.*

But if tenant in tail give or sell to me a tree growing upon the land, and dies before I have the tree, and his issue entereth into the land where the tree is growing, now I cannot cut the tree but he may have trespass against me: But it seems, if it were cut in his life-time, I may then take it away after his death. But *quære* of this, for some are now of a contrary opinion. *Kitch 226. a. b. 27 H. 8. f. 6. 18 E. 4. f. 6. a. and Hil. 18 E. 4. f. 21. in the end. Berk. Sect. 58.*

If tenant in fee-simple give or sell me a tree growing upon his land, and die before I have cut it, yet I may have it after his death if I please. *Perk. Sect. 58.* For as he might have disposed of the whole fee, his disposal of the trees which are part thereof, is good.

These are three kinds of *distresses* in the law, which is incident to the estate of every tenant, whether it be for life or years.

1. *House-rent.* Of which there are two kinds, the one to repair the houses, the other to burn, which is called *Fire-rent*.

2. Then there is *distress*, called *plough-rent*, that is, stuff to mend the tenants ploughs, carts, harrows, wains, and for making rakes and forks for getting in his hay and corn.

3. There is another kind of *distress*, called *Hedge-rent* or *Hay-rent*, this is timber and wood

for

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for making gates and stiles, and bought and bushes for mending and repairing hedges and fences.

1. So there is *estoverium ad faciendum & arandi*, house-boot.

2. *Estoverium arandi*, or plough-boot.

3. *Estoverium claudendi*, hedge-boot, or hay-boot.

Estover or *boot* signifies an allowance, compensation or satisfaction; and any of all these boots aforementioned a tenant may take without assignment of the landlord, unless he be by the landlord restrained by special covenant in his lease; which is very usual amongst many landlords, especially if the farm be any thing considerable, then they commonly limit the tenant how much *house-boot* or *plough-boot*, or *hedge-boot*, he may take without assignment; and how much by assignment. *Fide 2 Co. Inst. f. 18. Les Termes de la Ley, &c.*

If a tenant for life or years cut down trees; or pull down houses, or suffer them to fall down, the lessor shall have the trees and timber of the said houses; for the lessee had them only as things annexed to the land; and this severance will not give him a greater estate in them, but his interest is then determined. *Co. l. 4. 35, 62. &c.*

The landlord shall likewise have wind-falls; that is, timber-trees blown down by wind and tempest, because they are parcel of his inheritance, so that the tenant for life or years cannot have them, unless it be to build withal; where houses are in decay; but if they be dovecots or poultryards without timber, which bear neither leaves

nor fruit in summer, the tenant shall have such when they are blown down. *Dyer* 332.

Estovers granted to be burnt in such an house, shall go to him that hath the house by whatsoever title; for one is inseparably incident to the other. *Finch*, 4. 1. c. 3. p. 15. 1 *Park. Sett.* 104. *Kitch.* 51. a.

Lessee for life or years, tenant in dower or by the curtesy, or tenant in tail after the possibility, &c. have only a special interest or property in the trees, as things annexed to the lands, so long as they are annexed thereunto; but if they or any other sever the trees from the land, then their interest is determined, and the lessor may take the trees as things that are parcel of his inheritance, the interest of the lessee being determined. 4 *Rep.* f. 62. *Noy's Max.* 65.

If a stranger cut down a tree, growing upon the land of the lessee for years, and carry it or the bark thereof away, the lessor at his election may either have an action of trover against the stranger, or an action of waste against the lessee; for the property of the timber is always in the lessor, *non obstante* the statute of Gloucester which gives him his action of waste; and so was the opinion of *Jones*, *Whitlock* and *Richardson*, Hil. 7 Car. 1. in *B. R. Berry* and *Read's* case, *Cro. Rep.* 1 Par.

If one hath estovers incertain in ten acres of wood, and five of them descend to him, he shall have the whole out of the residue. *Critica Juris Ingeniosa*, p. 123.

If a man grant to another estovers in certain in such a wood, and afterwards the grantor makes such waste in the wood, as that there is not sufficient

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cient store left, out of which the grantee may take his estovers; in this case he may have a *quominus* against the grantor, which is in nature of a prohibition, forbidding him to make such waste. See after concerning waste.

Concerning Distresses, Replevin and Attoury, &c.

A *Distress* (*Districcio*) is a thing found upon the same land, and taken for rent behind, or other duty, or for *damage-feasant*, i. e. doing damage, though the property of the thing belongeth to a *stranger*.

Distress is a law of custom; that is, if rent be in arrear and unpaid, the landlord may take a lawful distress; and that he shall put in pound overt, there to remain until he be satisfied of what he distrained for.

So that if a landlord distrain the cattle for rent, and put them in a pound overt, and the beasts die there for lack of meat, it is at the peril of him that owned the beasts, and not of him that distrained; for in him that distrained there can be assigned no default, but the default was in the other, because the rent was unpaid. *Doctor and Student*, l. 1. c. 5. p. 10.

Now a distress must be made of such a thing, wherein some body hath a certain and valuable property; and therefore such things as are *ferre natura*, i. e. of *wild nature*, as dogs, conies, &c. cannot be distrained; neither can any one distrain a horse if any body be on the back of him; nor any thing which a man holds in his hands, or carrieth about him, annexed to his body.

And although the law be, that the landlord may distrain any thing that he finds *levant* or *couched* upon the premises for his rent behind, whose goods or chattles soever it be, and may detain the same until his rent be satisfied; yet this general rule hath some restriction and limitation, for there are several things whereof a distress cannot be taken.

Such things as are for the maintenance and benefit of trade, cannot be distrained for rent; as an horse that is shoeing in a smith's shop for the rent of the shop; nor an horse in an inn cannot be distrained for the rent thereof; nor the materials in a weaver's shop for making of cloth, nor cloth or garments in a taylor's shop, nor sacks of corn, nor meal in a mill for the rent thereof; for the *common presumption* is, that such things belong not to themselves, but to others. For this reason, an horse, &c. put out to pasture by way of *agistment* (because it is *presumed* to belong to the owner of the ground) may be distrained.

But any thing that the tenant hath distrained for *damage-feasant* may not be distrained, for that is in the custody of the law. *Nov's Max.* 124. *Terms of the Law*, Tit. *Distress*.

Likewise oxen of the plough may not be distrained; nor a mill-stone, though it be raised to be picked, so long as it lies upon the other stone. *Co. Lit.* f. 47.

Neither may a distress be taken of sheep, if there be a sufficient distress besides.

Neither can a man sever horses joined together, or to a cart; 1 *Vent.* 36. but he ought to have distrained cart and all, according to 20 *Ed.* 4. 3. Like-

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Likewise victuals, nor sheaf or stocks of corn, cannot be distrained; but carts or waggons loaded with corn may be distrained, either for rent or damage-feasants. *Co. Lid.*

A distress of a cart laden with corn, and four horses to it, was adjudged not to be excessive, because he could not sever the horses. *Vide 3 Cr. 7. 2 Ven. 183.*

No man's tools wherewith he works at his trade shall be distrained; as the carpenter's ax, or a scholar's books. *See Coke, Ibid. Vide Lord Raym. 384. 12 Mod. 216.*—while any other distress can be found.

Neither can any thing which is fixed to the freehold be distrained; as furnaces, coppers or fats fixed for dyers or brewers, (although the tenant may recover them during the term), nor the windows or doors of a house while they are upon the hinges: But if they be removed off from the hinges they may be distrained.

The landlord cannot distrain tables dormant in the house of his tenant, or any thing which cannot be attached in an assize; neither can any thing be distrained of which the sheriff cannot make a replevin, or that cannot be restored again in as good a condition as it was when it was distrained.

But the beasts of a stranger that escape into the landlord's ground, may be distrained for rent, tho' they have not been levant and couchant, &c. tho'

But see afterwards the Stat. a. 14. c. 1. made for Distresses.

they

they have not been in the ground for a good space of time, or so long as to have lain down and rest up again to feed. Otherwise, if the tenant of the land is in fault, in not keeping up his mounds, by reason whereof the beasts come upon the lands.

Vide 1 Inst. 47. b. — See Post.

The lord of a *leet* may sell a distress taken for an amerciamment in his *leet*, as the king may sell a distress, because it is the king's court.

But it is to be noted, that a court-leet can amerce for nothing but only publick nufances, and not for particular trespass or damage to the lord, or any other. *Vide 1 Saund. 135.*

And see *1 Vent. 105. T. Raym. 204.* That although by common right a distress may be taken for a fine in the court-leet; that is, where it is imposed for such things as are of common right incident to its jurisdiction, as for contempts and the like; yet where custom only enables them to set a fine, it cannot be distrained for without a custom so to do.

That for amerciaments in a *leet* the lord may distrain, although it be in the highway; but for amerciaments in a court-baron he may not, neither for an amerciamment in a *leet*, in a place seised into the king's hands for the king's debt. *Vide Doctor and Student, l. 2. c. 9.*

If a man distrain goods or chattels, they must be impounded in a *pound covert*, (within three miles in the same county); for if they are put into a *pound overt* and damaged, or stolen, the landlord must answer for them; as he must if himself doth any harm to them, or any other distress. *Wood's Inst. 191.*

If

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If a man takes an horse for a distress, and puts it in open pound, and the horse leaps three times over the pound, which is of the common height, for which reason he ties him to a post, in the pound, whereby he strangles himself, yet this will not excuse the distrainer, but an action of trespass lies against him. *Gilb. law of Eject. 52. 2 Will. Rep. 313, 314.*

If they be living cattle, they ought to be put in a common pound, or else in some open place, as in his own yard or close that distrained them, or in some other's by his consent; so that the owner may come lawfully to feed them: And the owner of the cattle must have notice where they are, if they be not in a common pound; and then if they die for want of meat, it is the owner's fault (as it is said before); but if they be in a pound covert, or out of the county, and die for want of meat, then he that distrained them shall make satisfaction for them.

Cattle taken *damage-feasant* may be impounded in the same pound where they are *damage-feasant*, but goods and cattle taken for other things may not. *Kitchin, f. 207.* But see *Stat. 11 Geo. 2. Post.*

No man ought to drive a distress out of the county † where it is taken, nor out of the hun-

† The defendant justified impounding cattle *damage-feasant*. And on evidence it appeared he put them into the next pound, though in another county. And on 3 *Lev. 48.* the *Chief Justice* held it did not make him a trespasser, though it subjected him to the penalty in the *Stat. 1 & 2 P. & M. c. 12.* Verdict for defendant. *T. 21 G. 2. Gimbart v. Pilab; in Midllx, 2 Str. 1272.*
dred

dred, but to pound *overt* within three miles; neither may a distress be impounded in several places, nor above four pence taken for the fees of impounding one whole distress, on pain of five pounds. *Ca. 1 Par. Inst. p. 57. Rasal, Tit. Distress 11.*

If a man distrain beasts *damage-feasant*, and put them in the pound *overt* within the same county, not above three miles out of the hundred, and the owner suffers the beasts to die for lack of meat, the loss is his own, and he that distrained them may be at liberty to bring his action for the trespass, if he will; and if it be not a lawful pound, then it is at the peril of him that distrained them; and so it is if he drive them out of the shire, and they die there. *Doctor and Student, l. 1. c. 27.*

If the owner of the cattle tender amends to him that distrained, and he refuses it, yet the owner may not take his cattle out of the pound, for he may not be his own judge; and if he do, a writ *de panno fracto* for breaking the pound lieth against him; but he must sue a *replevin* to have his cattle delivered him out of the pound, and afterwards plead his tender of amends, of which the jury must end the controversy. Also the owner must look to give them meat. *Ibid.*

But if the owner of the cattle procure a *replevin* to deliver them, and he that distrained them resist it, and will not deliver them; in this case, if they die after for want of meat, it is at the peril of him that distrained, and the owner shall recover damages against him in an action upon the statute for not obeying the king's writ. *Id.*

If a man sends his servant to take a distress for rent or service, who puts it in the pound, if the owner

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owner of the beasts or a stranger take them out, the master shall have an action *de parco fracto* for breaking of the pound.

And if one distrain cattle, and pound them in another man's close with his consent, and the owner of the cattle come and take them out; in this case he that made the distress shall have this action for pound-breach; and the owner of the close an action of trespass for breaking of his close.

If a man break the pound and take out goods, he that distrained may have *parco fracto* against the party; and may also take the goods again whereforever he finds them, and put them in the pound again. *Co. Lit. 47. a. 1. 2. 3.*

A man distrained, for ten pounds due to *Alchalmat* for rent; goods which were not of the value of forty shillings, and afterwards distrained for the residue; and it was adjudged that he could not avow, for the distress is not good, and it was his folly that he would not take a sufficient distress at first. But if a man be behind of his rent several days, and the lord take a distress for one day at one time, and for another day at another time, this is good. *Moor's Rep. pl. 261. Burser after, Stat. 17 Car. 2.*

If the lord distrain the cattle of his tenant, though nothing be behind, the tenant for the respect and duty which he owed to the lord, and which belonged to him, shall not have an action of trespass against him or his arms; but if the lord command his bailiff in such case to distrain where nothing is behind, the tenant shall have an action of trespass *vi & armis* against the bailiff.

Hugh's Grand Abridgment, 1 Par. p. 311. c. 7

4 Rep. f. 112.

If there be lord and tenant by rent or other service, if the rent be behind, the lord may enter into the tenant's house, if the door be open, and distrain for the rent or service, notwithstanding that the tenant holdeth lands in which he may distrain. *38 H. 6. 28. Co. 5 Rep. f. 92.* But a lord cannot break open the gates, or break down fences and inclosures to make a distress. *Ca. Lit. 161.*

If a man seised of lands in fee maketh a lease for life thereof, and afterwards he granteth a rent-charge, though the grantee cannot distrain the cattle of a stranger who is in possession of the land for the rent, yet if the grantor's cattle come upon the land he may then distrain them for the rent.

Brownl. 1 Par. f. 32.

Note; The statute of *Marlebridge, c. 4.* forbids the lord to take excessive distresses upon his tenant for rent or services, on pain of being grievously amerced. As for example, if the lord distrain two or three oxen for twelve pence, or the like small sum, and the owner bring a replevy of the oxen, and then the lord avow the taken of them for twelve pence, here of his own shewing he shall make fine, &c. or the party grieved may have his action upon the statute. *P. N. B. 89. 8 H. 4. 16. 11 H. 4. 2. Regist. 97. Co. 2 Par. Inst. f. 107.*

But if the lord distrain an ox or an horse for a penny, if there were no other distress upon the land holden, then this distress is not excessive; but if there were a swine or calf, &c. then the taking of the ox or horse is excessive, because he

might

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might have taken a beast of less value. 2 *Co. Inst.* fol. 107.

Yet an information lies not against a landlord for making excessive distress of tenants, because he ought to be amerced by the statute of *Marlebridge*, c. 4. whereas upon an information he must of necessity be fined. 1 *Vent.* 104. 2 *Inst.* 107. *Raym.* 193, 205. 1 *Mod.* 71, 288.

There be certain cases where a man may distrain of common right, and where not of common right: A man may distrain for rent-service, homage, fealty, escuage, suit of court, or for rent reserved upon a gift in tail, lease for life, years, or at will, though there be no clause of distress in the lease, because these distresses are of common right. *Co. Lit.* 204, 205.

But for debt, account, trespass, or for reparations, or the like, a man cannot distrain, neither can any distress be taken for any services which are not certain, nor can be reduced, or brought into any certainty. And upon an avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to certainty. *Doctor and Student*, l. 3. c. 4, 9.

Nevertheless (although it be a paradox) in some cases, there may be a certainty in an uncertainty: As for a man to hold of his lord to shear all his sheep depasturing within the lord's manor; and this is certain enough although the lord hath not always a certain number of sheep, but sometimes a greater number, and sometimes a lesser; yet this uncertainty, being reduced to the manor which is certain, the lord may distrain for. And a distress is inseparably incident to every service that may be reduced to certainty.

If

If there be lord and tenant, and the tenant pay the lord a greater rent than is due to him, and that voluntarily without coercion or distress; in this case the lord having gained seisin, may distrain for such surplussage of rent, and the tenant cannot avoid it upon the lord's avowry, because of the seisin of the rent; but in such case he may have his remedy by a writ of *re injunctio vasa* upon the statute of *Magna Charta*, c. 10. *F. N. B. M. Co. Lit. 25.*

But *note*; This rule holdeth not in the case of a successor, or issue in tail, for they may avoid such incroachment in an avowry; or if the incroachment be of another nature than the service, if that be gained by coercion or distress, in such case the tenant may avoid such seisin in an avowry. *Co. 2 Inst. f. 21.*

A rent-charge was granted for years, with a *nomine pence* and clause of distress, if it were not paid at the day, and the rent was behind, and the years incurred; and it was moved, if the grantee might distrain for the *nomine pence*, the years being incurred? And the opinion of the whole court was, That he could not distrain for the *nomine pence*, for that did depend on the rent, and the distress was gone as to both. *Passb. 18 Jac. in C. B. Tottin and Fryer's case, Wimb's Rep. f. 7.*

If a horse or beast come into a man's ground as an estray, he may not work them; neither may a man work a distress, for he hath neither property or possession *in jure*; but if a man hath an horse, ox or cows in pawn, he hath a special property in them, and may work and use them in such sort as the owner may do. *Quinn's Rep. f. 123. Cro. Jac. 148.*

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If the tenant forestall the way with force and arms, and threatens in such manner that the lord dares not come to demand or distrain for the rent; or if there be no distress on the ground, nor none ready to pay the rent, then in this case the lord may have a writ of *novel disseisin* against the tenant, and recover his rent and arrearsages. And if the rent be behind another time, he may have a *redisseisin*, and recover double damages. *Co. Lit. 153. b. 161. b. Fleta, l. 1. c. 42. Ny's Max. p. 45.*

Also for heriot-service the lord may distrain or seise; but for heriot-custom he cannot distrain, but may seise. *Doctor and Student, f. 75.*

Tenant to pay a heriot-beast, or 5^s. at the election of the lord.

A bailiff may not distrain for such heriot before the lessee hath declared his election, though the lessor may. *Lit. Rep. 33. 35.*

An heriot shall go with the reversion as well as the rent, and for which the grantor may distrain. *2 Saund. 166. Vide antea.*

Also it seems a bailiff, where a lawful tender of rent has been refused, may not distrain without the command of the lessor. *Lit. 34. Kider ibid. 65.*

Where a lease is made to commence on the determination of another, if the new lessee dies before his term commences, it is said the heriot reserved shall not be due. *1 Kent. 91. 2 Saund. 165. 2 Keb. 677. 1 Sid. 437.*

If a man hath common without number, yet he ought not to surcharge the soil, but that the lord may have the common also. *1 Saund. 345.*

And

And if a tenant over-charge the soil where he has common without number, the lord may distrain him, but an admeasurement does not lie.

If a stranger puts his cattle into the common, a commoner may distrain them; but in the avowry he ought to shew damages. 2 *Lev.* 252. 3 *Lev.* 104. And that the landlord of a common cannot put in the cattle of a stranger. 2 *Lutw. Rep.* 107. See afterwards, *Chap. VII.*

Though a man may not distrain for rent after the lease is ended, nor out of the premises, (except in some special cases), nor in the night, unless for *damage-fasant*; yet the executors or administrators of him who had lands in fee, or fee-tail, or for life, may either have an action of debt against him that should pay it, or distrain for it; and so may the husband after the death of his wife, his executors or administrators, and he which hath rent for another's life, for the arrearages after his death.

The grantee of a reversion may distrain for an heriot. 2 *Saund.* 166.

If the beasts escape into any ground, and the lord distrain them for rent, the distress is good. *Idem* 289, 290. And that it is not material whether they were levant or couchant, or not. *See after.*

Where cattle escaped out of a close next adjacent; adjudged that they might be distrained for rent, although they escape through default of the fences which the party distraining ought to have repaired. *Id.* 289.

By *Treby* chief justice, where the cattle escape accidentally, there they are not distrainable until they have been levant and couchant; but if they escape

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escape by default of the owner, they are distrainable the first minute. *Lord Raym.* 169, *Kempe* and *Crewes*.

In all cases when the land is the debtor, the cattle of a stranger is as well liable as those of the owner of the land; as cattle of a stranger levant and couchant are distrainable for arrears of rent-service. So if a neighbour's cattle escape into land out of which a rent-charge issues, and are levant and couchant, (these are good authorities, though they are not levant and couchant) they are distrainable for the rent-charge, and the owner shall not have them again unless he pays the arrears. *Lord Raym.* 309.

A lord of the soil may distrain for *damage-feasant*, although he have no interest in herbage, for there may be other damage besides eating the grass. 2 *Saund.* 328.

A man puts cattle into my pasture for a week, and afterwards I give him notice that I will keep them no longer, and he will not fetch them away, I may distrain them *damage-feasant*. *Nay's Max.*

33.

If a man takes cattle *damage-feasant*, and as he is driving them to pound they run into the yard or house of the man that owns them, and he refuses to let them out again, he that distrained them may have a writ of *rescous* against the owner of the beasts for so doing.

If a landlord come to distrain for rent, and see the cattle, and the lessee or his servants drive them out of his fee, he cannot have a writ of *rescous*, because the cattle were not in his possession; but he may follow after them, and distrain them in another man's ground, it being for rent;

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rent, but not for *damages-forsan*; for they must be taken *damages-forsan*, that is, doing damages. *Co. Lit.* 161.

If a man distrain goods, and declare not the cause or reason whereof he doth it; if they be put in a house, the owner may break the house and take them out: *Clayton's Rep.* p. 64. pl. 111.

Or if a man distrain goods, without cause, the owner may release them; but if they be pound'd, he cannot break the pound and take them out, because they are then in the custody of the law.

Lord Rayn. 104. 105. *Consworth v. Botson*, *St. P.*

But if he find the pound door unlocked, he may take them out.

Although there be a general prohibition in the laws of *England*, That it shall not be lawful for any man to enter upon the freehold or possession of another, without permission and authority of the owner, or of law; yet this is not without exception.

For if a man drive beasts along the highway, and the beasts run in any man's corn or grass, and he that driveth them goeth after them into the grounds to fetch them out, he may justify that entry into the grounds to fetch them out. *Dutton and Studd.* 1. 1. c. 10.

Also hindring the carrying of a lawful distress, is a provocation to make killing no more than homicide. *Winn.* 216. the case of *Goff*, collector of chimney-money.

The court hold, that cattle driving to a market, and put into pasture by the way, were not privileged from being distrained; for it is by the statute of *Marbridge*, That beasts cannot be distrained

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trained in the highway, and not by the common law. 2 *Vent.* 50. 3 *Lev.* 260.

Where one holds a third part of certain land, and another two third parts of the same land undivided, he who hath the one part cannot distrain the cattle which were put in by licence of him who hath the two parts. *Idem* 228, 283. *Hob.* 80, 103.

If a man make a feoffment, and that in fee by indenture, reserving rent, he cannot distrain for that rent, unless a distress be expressly reserved; and if the feoffment be made without an indenture, reserving rent, that reservation is void in the law. And the like law is where a gift in tail, or a lease for term of life is made, the remainder over in fee, reserving a rent, that reservation is void in the law.

Also if a man seised of land for term of life granteth away his whole estate, reserving a rent, that reservation is void in the law, without it be by indenture; and if it be by indenture, he shall not distrain for the rent, without a clause of distress be reserved. *Doct. and Student*, l. 2. c. 9.

Also if a man make a lease at *Michaelmas* for a year, reserving a rent payable at the feast of the annunciation of our *Lady* and *St. Michael* the archangel; in this case he may distrain for the rent due at our *Lady-day*, but not for the rent due at *Michaelmas*, because the time will be expired. *Ibid.*

Yet if a man make a lease at the feast of *Christmas*, for to endure to the feast of *Christmas* next following, viz. for a year, reserving a rent at the aforesaid feasts of our *Lady-day* and *Michaelmas*;

in this case he shall distrain for both the rents as long as the term continues, that is to say, till the aforesaid feast of *Christmas*. *Ibid.*

And if a man have lands for term of life of *J. N.* and makes a lease for term of years, reserving a rent, the rent is behind, and *J. N.* dieth, there he shall not distrain, because his reversion is determined. *Ibid.*

And if a town or parish be amerced, and the neighbours by assent assess a certain sum upon every inhabitant, and agree, That if it be not paid by such a day, that certain persons thereunto assigned shall distrain; in this case the distress is lawful. *Ibid.*

If there be lord and tenant, and if the tenant do hold of the lord by fealty and rent, and the lord doth grant away the fealty, and reserve the rent, and the tenant attorneth; in this case he that was lord may not distrain for the rent, for it is become a rent-seck. *Ibid.*

But if a man make a gift in tail to another, reserving fealty and certain rent, and after that he granteth away the fealty, reserving the rent and the reversion to himself; in this case he shall distrain for the rent, for the grant of the fealty is void; for the fealty cannot be severed from the reversion. *Ibid.*

Also if a rent be assigned to make a partition or an assignment of dower equal, he or she to whom the rent is assigned may distrain. And in all these cases aforesaid where a man may distrain, he may not distrain in the night; but for *damage-feasant*, that is, where he finds beasts doing hurt in the ground, he may distrain them night or day when he finds them, because if he was to wait till the morning

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morning they might escape off the land, and he not know whose cattle they were, so be totally without remedy: But for waste, reparations, accounts, or for debts upon contracts, or such like, no man can lawfully distrain.

If beasts be distrained *damage-feasant*, tender of sufficient amends makes the distrainer liable to damages for detainer, though not for the distress. *Lit. Rep. 34. Vide Chap. V.*

If a man distrain dead goods which may receive damage by the weather, he ought to impound them in a house, or other pound covert, within three miles in the same county; for if he impounds them in a pound overt, he shall answer for them. *Co. Lit. 47. b.*

If a horse leaps over the pound, it is not lawful for the person distraining to tie him there notwithstanding; for if the horse receive any damage, the owner may have an action of trespass, according to 27 *Aff. 64.* where a horse having leaped over the pound three times, was afterwards tied to a post there, and strangled himself.

Where one abuses a distress, he is a trespasser *ab initio*, and therefore if in trespass the defendant justifies *nomine districtionis*, the plaintiff may shew an abuse, and it is no departure, but makes good his declaration. *Gargrave v. Smith, Hil. 2 W. & M. C. B. Salk. 221.*

One who was not a common carrier undertook to carry goods from London to Birmingham, and at Birmingham put the goods with the waggon into his barn, where they continued two nights and a day, and then the landlord came and distrained them for his rent. *Resolv. per cur.* That where goods are delivered to any person exercising a

publick trade or employment, to be carried, wrought or managed in the way of his trade or employ, they are for that time under a legal protection and privileged from distress for rent: And it was further resolved, That any one undertaking for hire to carry the goods of all persons indifferently, is as to this privilege a common carrier, for the law gives this privilege in respect of the trader, and not in respect of the carrier. *Gisburn v. Hurst*, Hil. 8 Ann. B. C. *Salkeld* 249.

Where cattle escape into a man's lands through default of the lessor or his tenant, in not making up the fences, they cannot be distrained for rent arrear for such lands until the owner have notice, or until they have been levant and couchant. *Lutw. 1578*, *Kemp v. Cruwys*. But where cattle escape by default of their owner, and are trespassers, they may be distrained for rent before they are levant and couchant, or before the owner has notice of their being upon the lands. *ibid.*

But whether the lord or the grantee of a rent-charge may not distrain the cattle of a stranger, that have escaped into lands out of which such rent is issuing, before they have been levant, &c. although there was a defect in the fences, *vide Lutw. 1579*, where it seems to be admitted.

Note; It seems goods, and the tools of a man's trade, are distrainable for a duty arising by act of parliament, though not for rent, or amerciaments, or other duties due by the common law. *2 Show. 127. Sed quare.*

The servants of a grazier, driving a flock of sheep to *London*, are encouraged by an inn-keeper

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keeper to put the sheep into pasture grounds belonging to the inn. The landlord seeing the sheep consents they shall stay there one night, and in the morning distrained them for rent due to him from the inn-keeper. The sheep were replevied, and the landlord obtained judgment in that action in the common pleas. Grazier relieved in equity against this distress. *T. 1690. Fowkes ver. Joyce and others in Chan. 2 Vern. Rep. 129. Prec. in Chan. 7. S. C. 3 Lev. 260. 2 Ventr. 50.*

“ By stat. 2. *W & M. c. 5.* where any goods or
 “ chattels shall be distrained for any rent reserv-
 “ ed and due upon any demise, lease or contract
 “ whatsoever; and the tenant or owner of the
 “ goods so distrained shall not, within five days
 “ next after such distress taken, and notice
 “ thereof (with the cause of such taking) left
 “ at the chief mansion-house, or other most no-
 “ torious place on the premises charged with
 “ the rent distrained for, replevy the same, with
 “ sufficient security to be given to the sheriff ac-
 “ cording to law; that then after the expiration
 “ of the said five † days, the persons distraining
 “ shall and may with the sheriff or under-sheriff
 “ of the county, or with the constable of the
 “ hundred, parish or place, where such distress

† The landlord must remove the goods at five days end, or he is a trespasser, *M. 13. co. 1. Griffin v. Scott, 1 Str. Rep. 717. Lord Raym. Rep. 1424. Barnard. K. B. 3. 4. But see Stat. 11 Geo. 2. c. 19. sect. 10.*

“ shall be taken, (who are hereby required to be
 “ aiding and assisting therein) cause the goods
 “ and chattels so distrained to be appraised by
 “ two sworn appraisers, (whom such sheriff, un-
 “ der-sheriff or constable, are hereby impowered
 “ to swear to appraise the same truly, according
 “ to the best of their understandings), and after
 “ such appraisement, shall and may lawfully sell
 “ the goods and chattels so distrained, for the
 “ best price that can be gotten for the same,
 “ towards satisfaction of the rent, for which the
 “ said goods and chattels shall be distrained, and
 “ of the charges of such distress, appraisement
 “ and sale, leaving the overplus (if any) in the
 “ hands of the said sheriff, under-sheriff or con-
 “ stable, for the owner's use.

“ Any person having rent in arrear, and due
 “ upon any such demise, lease or contract, as
 “ aforesaid, may seize and secure any sheaves or
 “ cocks of corn, or corn loose, or in the straw,
 “ or hay, lying or being in any barn or granary,
 “ or upon any hovel, stack or rick, or otherwise,
 “ upon any part of the land or ground charged
 “ with such rent, and to lock up or detain the
 “ same in the place where the same shall be
 “ found †, for and in the nature of a distress,
 “ until the same shall be replevied upon such se-
 “ curity to be given as aforesaid; and in default
 “ of replevying the same as aforesaid, within
 “ the term aforesaid, to sell the same after such

† For they cannot be removed, but must be secured
 upon the land.

“ appraise-

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“ appraisement thereof to be made; so as never-
“ theless such corn, grain or hay, so distrained
“ as aforesaid, be not removed by the person or
“ persons distraining, to the damage of the
“ owner thereof, out of the place where the
“ same shall be found and seized, but be kept
“ there (as impounded) until the same shall be
“ replevied, or sold in default of replevying the
“ same within the time aforesaid.

“ Upon pound-breach or rescue of goods
“ or chattels distrained for rent, the person or
“ persons grieved thereby shall, in a special ac-
“ tion upon the case, for the wrong thereby
“ sustained, recover his and their treble damages
“ and costs of suit against the offender and
“ offenders in any such rescue or pound-
“ breach, any or either of them, or against the
“ owner of the goods distrained, in case the
“ same be afterwards found to have come to his
“ use or possession.

“ In case any such distress and sale, as afore-
“ said, shall be made by virtue or colour of this
“ present act for rent, pretended to be arrear and
“ due, where in truth no rent is arrear or due to
“ the person or persons distraining, or to him or
“ them in whose name or names, or right, such
“ distress shall be taken as aforesaid, that then
“ the owner of such goods and chattels distrained
“ and sold as aforesaid, his executors or admi-
“ nistrators, shall and may, by action of tres-
“ pass, or upon the case, to be brought against
“ the person or persons so distraining, any or
“ either of them, his or their executors or ad-
“ ministrators, recover double the value of the
“ goods

“ goods or chattels so *distrained* and *sold* *, together with full costs of suit.”

This act of parliament only extends to such a pound-breach, and rescuing of goods, &c. as are distrained for rent; and in observing thereon, it will be proper to remark, that in an action brought against the *owner* of the goods, &c. for a pound-breach, it will not be necessary for the plaintiff to give evidence of an actual breach of the pound; proof of the goods, &c. having been in the defendant's possession, since their seizure will be sufficient; and the legislature very wisely guarded against any objections that might be raised for want of proof of an actual breach, by declaring that the landlord should recover against the owner of the goods distrained, in case the same were afterwards found to have come to his use or possession; for tho' there cannot be a stronger presumptive proof of a person's having broke the pound, than his being in possession of the goods deposited therein; yet juries, from a delicate tenderness, might have been unwilling to have found a person guilty of an offence, liable to so severe a punishment, without evidence of an actual pound-breach, if the statute had not provided against it, as above set forth; besides the act hath expressly given a power to the landlord to punish as well those who actually broke the pound, as the owner of the goods, who received them; and here let me observe, that in the construction of this law, it hath been determined, that the plaintiff shall not only recover treble damages, but likewise treble

* *Note*; That the goods must be *sold* as well as *distrained*; otherwise no action for the double value.

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costs. Moreover, the penalties created by this act, as far as they relate to the tenant or owner of the goods, and such persons as are guilty of a pound-breach, or rescous of the goods, are now so far enlarged, as to comprehend offences that were incapable of being committed at the time of the statute of 2 *W. & M. c. 5.*

Upon a question about taking a distress, it was held, That a padlock on a barn-door could not be opened by force to take the corn by way of distress. *Vin. Abr. 128. pl. 6.*

The person distraining must give notice, but it need not be immediately, but at any time after the distress; but then the five days are to be computed from the notice, not from the distress. If the party replevy, all this is to no purpose; therefore, before you venture to make any sale, search the sheriff's office within the five days.

The rent may be tendered after the five days if no appraisement, and a tender after appraisement prevents the sale, for all is but to have the rent, and no property is in the distrainer, but only in the vendee by sale.

Any persons may be appraisors that are of age and capable of being witnesses; but they must be sworn by the sheriff or constable for that purpose. The appraisement shall be in writing.

Suppose the appraisement is higher than they can be sold for, may they sell them notwithstanding?

I think they may; for the words are, *For the best price that can be gotten for the same*; and it is not said, for what they were appraised at, or above that rate. But are they bound to carry them to market, or wait for a good chapman? For the words of the act are, *(best price that can*

he gotten), and no time is limited for the sale, and charges are allowed for it. I do think it most advisable, if it can be, to get the value settled by the appraisers, and to sell immediately to the first chapman; if not, to wait some small, reasonable, and convenient time, as a week or the like; if you cannot get that price, to sell to the highest bidder. And the next convenient way seems to be by giving notice at the next market or parish-church, of the day and place, when and where the goods shall be exposed to sale; yet I conceive, that after the expiration of the five days, and no replevy, and an appraisement, the party may carry any portable marketable goods and commodities to the next market, as corn, or the like, and there sell them, and he shall have his charges allowed for such carriage, if he could not have a chapman at home; I think it always advisable for the buyers to have a bill of sale of all such goods so distrained, appraised, and sold, and the sheriff or constable witnesses thereto. As to the charges, I think the expence in removal of the goods, charges of food for living creatures, and moderate necessary expences for tenants and officers, will be allowed within the meaning of this clause.

For the overplus (if any) to be left in the sheriff or constable's hands, it is advisable for the landlord to have a receipt or other writing, testifying the same; for the corn or grain the law is the same as to sale, only there it is not to be removed, if to the damage of the owner, otherwise it may. *9 Vin. Abr. 128. Notes to Pl. 8.*

Upon this act, if corn be distrained in the field, the party may carry it away, or else by its lying

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on the ground it may spoil, and every taking and removing of the corn out of the place, where it was, is a taking and carrying away in law; *per Holt and Powell*. For *per Holt*, the act of parliament is only, that it be not removed to the damage of the owner, and as long as it is not at the damage of the owner, it may be carried out of the field. But by *Holt*, if corn be distrained in a rick, I doubt whether it can be carried away. 9 *Vin. Abr.* 142. Note to Pl. 53.

Upon the 2 *W. & M. chap. 5.* notice of the taking the distress is sufficient, when it is given to the party himself, as if he be met with at any place; and such notice saying that the distress was taken for rent due at Michaelmas last, without particularly mentioning the quantum, was held sufficient. 9 *Vin. Abr.* 179. pl. 9.

In distress on this act the notice was given to the owner of the cattle himself; it was objected that it should have been at the chief mansion-house, or other notorious place upon the premises; but *non allocat'*; for *per cur'* the intent of the act was only that the party should have notice. Notice to the owner of the goods sufficient, without notice to the lessee. Lands in divers counties demised by one demise, rendering rent, distress may be taken in either of them, and where the distress is taken for one cause, cannot be severed. 1 *Raym.* 53, 54. *Walter and Rumball*.

An Oath to be administered to the Appraisers of Goods distrained.

YOU shall well and truly, according to the best of your understanding, appraise the goods and chattels of H. R. distrained on for rent by O. P. of which

which goods and chattels you shall have good sight and consideration.

So help you GOD.

Another Form of Appraisers Oath.

YOU shall swear, that you will faithfully appraise and value the goods now taken in distress, and mentioned in the inventory to you shewn, as between buyer and seller, according to the best of your skill and understandings: You shall not, through partiality, interest, or otherwise, over or under estimate the said goods, but impartially do your duties herein.

So help you GOD.

The appraisors, valuing the goods too high, shall be obliged to take them at the price appraised. *Stat. 13. Ed. 1.*

Though *stat. 2 W. & M. c. 12. s. 1.* says the goods shall be appraised by two sworn appraisers, I take it they are not to be understood to mean such persons only who get their livelihood by valuing goods, but to comprehend every one who is capable of estimating and setting a price upon the things seized, which may be different according to the nature of the estate, and depend, whether it consists of a farm or an house in town; for tho' an auctioneer in London would be a very competent judge of household furniture, yet I presume he would be a very improper person to sell sheep or oxen; and therefore I take it, the sheriff or constable may appoint and swear any two competent judges to set a price upon the distress; and they are called sworn appraisers merely from their being sworn for the particular purpose

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pose of appraising those goods. Indeed the legislature, in leaving this matter at large, seems to have acted extremely prudent, inasmuch as no persons whomsoever can be presumed to be so good judges of cattle, corn, and things of that nature, as those who live upon the spot, and hear the constant market price they bear; which depend much upon the place where they are sold.

The Form of the Inventory and Appraisement.

*A*N inventory and appraisement of the goods seized and distrained by A. B. &c. in the house of C. D. of, &c. for—pounds, being one half-year's rent, due to the said A. B. from the said C. D. at Lady-day last: Taken and appraised the day of in the year, &c.

In the Fore Garret.

A round oak table, &c.

In the Back Garret.

Two beech matted chairs, &c.

In the Chamber Two Pair of Stairs.

A blue China bed, &c.

In the Kitchen, &c.

Valued in all at—

By us

E. F. }
G. H. } Sworn appraisers.
J. K. Constable.

Notice

Notice of Distress to the Tenant.

Mr. A. B.

TAKE notice that I have this day seised upon your goods in your house in, &c. for pounds, half a year's rent due to me at, &c. last; and have taken an inventory thereof, (a copy of which is hereunto annexed) and locked the same up in your chamber one pair of stairs; and if you do not pay the rent due, or replevy the goods mentioned in the said inventory, I shall, at the expiration of five days from the date hereof, make sale thereof, according to the direction of the act of parliament, of which take notice from

Dated, &c.

Your, &c.

C. D.

I would advise you to be as exact as possible in transcribing the above inventory and notice, as it may be necessary for you to prove them, in case any action should be brought for making the distress.

The author of the dialogue between a Country (1) Gentleman and a Lawyer, says that the notice of distress should regularly be directed to the lessee, and not to the person in possession; but in this I apprehend he is mistaken; because the act of parliament says, tenant or owner of the goods. Now the lessee may not be tenant, and his goods may not be liable; as for instance, suppose Rayner grants a lease to Jackson, who underlets

+ It is observable that the dialogue runs in the name of a countryman all through.

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the estate or assigns it to *Smythe*, for the remainder of the term, in that case *Jackson* is the tenant of *Rayner*, yet he is not the tenant in possession or the owner of the goods distrained; the notice therefore ought not to be directed to him, but to *Smythe*, and delivered to him; for the sole end of the notice is to give the owner of the goods an opportunity of replevying or redeeming them.

Mortgagee need not give notice to tenant to quit, before bringing his ejectment, if he means only to get into the receipt of the rents and profits of the estate, tho' the mortgage be made subsequent to the tenant's lease, but in such case, he shall not be suffered to turn the tenant out of possession, by the execution; in the present case, the lease was only from year to year, and, with respect to the last year, might be considered as a lease subsequent to the mortgage, but the court held it would have been the same, if the lease had been for a long term. *Mish. 14 Geo. 3. B. R. White, on the demise of Whalley and Hawkins, Bul. Ni. Pri. 96.*

If tenant holds from year to year, landlord cannot maintain ejectment, without giving six months previous notice, unless the tenant have attorned to some other person, or done some other act, disclaiming to hold as tenant to the landlord; and in that case no notice is necessary. *Hil. 9 Geo. 3. B. R. Throgmorton and Whelpdale, Bul. Ni. Pri. 96.*

It has not been doubted of late years, that half a year's notice to quit possession must be given to a tenant at will, before the end of which time an ejectment will not lie to turn him out; the

the same law in case of an executor of a tenant at will by *Wilmot* Ch. J. and the whole court. *Mich. Term, 10 Geo. 3. 1769. C. B. Parker in Demise of Edward Walker, v Constable. 3 Wils. Rep. 25.*

By the latter clause of the aforesaid act it seems, That if goods be distrained upon pretence for rent where none is due, yet no action lies by this act, unless they were also sold as well as distrained; so that the party must not in this case replevy his goods, if he intend to take the benefit of this act.

But he may replevy them, or let them lie, and have the benefit of the former law.

So the party distraining corn and hay, and keeping it upon the place under pretence of rent, is liable, as formerly, to an action and damages, if he cannot justify that rent was then due; and if he can, he may detain them there till replevied or sold, by virtue of this act.

And yet it seems, that after appraisement of the corn or hay, and tender of the money, and reasonable charges by some person willing to buy the same, he may not detain the corn or hay longer in the barn, granary, hovel, &c. for this would be great prejudice to the owner, if the party distraining may sell them, after appraisement, when and to whom he will. *Sed quare.*

The words are, *Be not removed to the damage of the owner thereof.* This might have been enough, if the party distraining had right; he is bound to take care of damage.

But it seems the corn and hay must not be removed; for the following words are,

But be kept there (as impounded) until the same shall be replevied or sold within the time aforesaid; that

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that is, after the appraisement. And it is the party distraining that shall and may cause them to be appraised after five days notice: But see the act of 8 *Ann. infra*.

By the *Stat. 7 Ann. c. 12. The goods of an ambassador*, or other publick minister, or his servants, shall not be distrained; if they are, the distress is void. See 10 *Mod. 4.*

By (a) *Stat. 8 Ann. c. 14. s. 1.* "No goods upon any tenant leased shall be taken by any execution, unless the party at whose suit the execution is sued out, shall, before the removal of such goods, pay to the landlord of the premises or his bailiff, all money due for rent for the premises; provided the arrears do not amount to more than one year's rent, and in case the arrears shall exceed one year's rent, then the party at whose suit, &c. paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment; and the sheriff is required to levy and pay to the plaintiff, as well the money paid for rent, as the execution-money."

An (b) administrator is intitled to a year's rent, on an execution, in pursuance of this statute; without payment of any (c) poundage or other deduction whatsoever; for it is an interest (d)

(a) This statute was made for the benefit of landlords, and to prevent tenants setting up sham executions to defeat landlords of their rents. *Sira. 97.*

(b) *Sira. 97, 212. Lit. Ent. 46. Gilb. Eq. Rep. 222.*

(c) *Sira. 643.*

(d) 9 *Vin. Abr. 158. Fortife. Rep. 360. Sira. 214.* but this was over-ruled in C. B. *Sira. 214.*

vested; but then he must have (a) obtained letters of administration, and given the (b) sheriff (c) notice in writing, and also have made a (d) demand of the rent, previous to the (e) removal

(a) The administrator must make himself capable of the remedy, which he here could not; the administration of the intestate's goods not being committed till after the plaintiff in the execution had levied the money by sale of the goods; the administrator could not demand the rent, it not being certain that he would be administrator, for the ordinary might refuse; if it should be otherwise, it would be in the power of him who is intitled to administration to defeat the plaintiff of his execution; for suppose he never takes out administration, must the execution stand still? *Stra.* 97. See *Gilb. Eq. Rep.* 222, 223. *Forrest. Rep.* 360.

(b) The sheriff is not obliged to wait and see if any body comes and demands the rent, he cannot take notice what arrears there are; but if the landlord comes and acquaints him with it, then and not till then he is obliged to see the year's rent satisfied, before the goods are removed. *Stra.* 97.

(c) Notice to the plaintiff is no notice to the sheriff; but if it were to him, and not to the sheriff, should the sheriff be liable? As to what is reasonable notice, is not appointed by the act. *Eyre* justice said, that without notice the sheriff could not transgress the act. But by *Fortescue* justice, when the law does not determine what notice shall be given, the party must take notice, especially here, for the act says, The sheriff shall not remove, &c. and that where no person is directed to give notice, it is at his peril. *9 Vin. Abr.* 158.

(d) If the landlord himself does not demand the rent before removal of the goods, he will be too late. *Stra.* 97

(e) *Gilb. Eq. Rep.* 222

of

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of the goods, or the money (a) levied in execution, by (b) sale of them.

A tenant was outlawed at the suit of one *Greaves*, and his goods and money were seized by process on the outlawry, but still remained in the sheriff's hands.

It was now moved upon the Stat. 8 Ann. c. 14. on behalf of the landlord, that he might be satisfied one year's rent in arrear out of the money in the sheriff's hands.

And the court thought it ought to be granted, because a *capias utlagatum* at the suit of the party is to be considered only as a private execution, and is only auxiliary to the party, and ordered the sheriff to shew cause.

This order was afterwards made absolute, *baron Price* only then in court; but it was afterwards stirred again before lord chief baron *Gilbert*, *Price*, and *Page*, when the order was made absolute, *per totam (c) curiam*.

If the sheriff, after notice to him, of what rent is due, removes the goods without making the landlord (d) satisfaction, the administrator may (e) maintain an action, against the sheriff, for the removal of the goods is a wrong (f) to the (g) estate of the intestate, and he is thereby injured and (h) aggrieved.

(a) *Fortesc. Rep.* 360.

(c) *Bomb.* 194. pl. 271. *11 Mod.* 158.

(e) *Sen.* 214.

(g) Where the injury is to the estate, in any manner whatsoever, the action survives, if the estate survives.

9 *Vin. Abr.* 158.

(b) 9 *Vin. Abr.* 158.

By Stat. 8 Ann. c. 14. s. 2. " In case any lessee
 " for life, term of years, at will, or otherwise,
 " of any messuages, lands or tenements, upon
 " the demise whereof any rents are or shall be
 " reserved or made payable, shall fraudulently or
 " clandestinely convey or carry off from such demised
 " premises his goods or chattels, with intent
 " to prevent the landlord or lessor from distraining
 " the same for arrears of such rent, such lessor or
 " landlord, or any person by him impowered,
 " within five days next ensuing such conveying
 " away, or carrying off such goods or chattels as
 " aforesaid, may take and seise them wherever
 " found, as a distress for the said arrears of such
 " rent; and the same may sell or otherwise dispose
 " of as if they had actually been distrained by
 " such lessor or landlord, in and upon such demised
 " premises, for such arrears of rent.

" Nothing in this act contained shall be construed
 " to extend to impower such lessor or
 " landlord to take or seise any goods or chattels
 " as a distress for arrears of rent, which shall be
 " sold *bona fide*, and for a valuable consideration,
 " before such seisure made.

" Any person having rent in arrear, or due
 " upon any lease or demise for life, may bring an
 " action of debt for such arrears of rent, as they
 " might have done in case such rent were due
 " and reserved upon a lease for years.

" And that all distresses to be made as aforesaid,
 " shall be liable to such sales, and in such
 " manner, and the monies arising by such sales to
 " be distributed, as by Stat. 2 W. & M. Chap. 5.
 " is directed.

" Any

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“ Any person, having any rent in arrear, or
“ due upon any lease for life, for years, or at will,
“ ended or determined, may distrain for such
“ arrears after the determination of the said res-
“ pective leases, as they might have done if
“ such lease or leases had not been ended or de-
“ termined,

“ Distress to be made within six months after
“ the determination of such lease, and during
“ the continuance of such landlord's title or in-
“ terest, and during the possession of the tenant
“ from whom such arrears became due.

“ Not to extend to prejudice the crown, in the
“ levying, recovering or seizing any debts, fines,
“ penalties or forfeitures, that are or shall be due,
“ payable or answerable thereto; but that the
“ crown may levy, recover, and seize such debts,
“ fines, penalties, and forfeitures, as if this act
“ had never been made.”

Note; By Stat. 17 Car. II. Chap. 7. when-
soever any plaintiff in replevin shall be nonsuit
before the issue joined in any suit of replevin, by
plaint or writ lawfully returned, removed or de-
pending in any of the king's courts at *Westmin-*
ster; the defendant making a suggestion in na-
ture of an avowry or cognizance for such rent, to
ascertain the court of such cause of distress; then
the court upon his prayer shall award a writ to
the sheriff of the county where the distress was
taken, to inquire by the oaths of twelve good and
lawful men of his bailiwick, touching the sum in
arrear at the time of such distress taken, and the
value of the goods or cattle distrained; and upon
fifteen days notice given to the plaintiff or his at-
torney in court, of the sitting of such inquest,
the sheriff may inquire of the truth of such matters
contained

contained in the writ, by the oaths of twelve men, &c. And upon return of the inquisition the defendant (that is, he that distrained) shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value; and in case they shall not amount unto that value, then so much as the value of the said goods and cattle shall amount unto, together with his full costs of suit, and shall have execution thereupon by *fiery facias* or *elegit*, or otherwise as the law shall require. And in case such plaintiff shall be nonsuit after cognizance or avowry made, or issue joined, or if the verdict shall be given against such plaintiff, then the jurors that are impanelled or returned, to inquire of such issue, shall at the prayer of the defendant inquire concerning the sum of the arrearages, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes a countenance, shall have judgment for such arrearages, or so much thereof as the goods and cattle amount unto, together with his full costs, and shall have execution of the same as aforesaid.

And if the judgment in any of the courts aforesaid be given upon demurrer for the avowant, or him that maketh countenance for any rent, the court shall, at the prayer of the defendant, award a writ to inquire of the value of such distress; and, upon the return thereof, judgment shall be given for the avowant, or him that makes countenance as aforesaid, for the arrears alleged to be behind in such avowry or countenance, if the goods or cattle so distrained shall amount to that value; and in case they shall not amount to that value, then for so much

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much as they amount unto, together with his full costs of suit, and have execution thereof as aforesaid.

And in all cases aforesaid, where the distress is not of the value of the rent arrear, there the party to whom these arrearages are due, his executors or administrators, may from time to time distrain again for the residue of the said arrears, which formerly a man could not do, for he might not distrain twice for one rent, for it was accounted his folly that he took not a sufficient distress at first. But now by statute, That and several other advantages are taken away from the tenant.

Where corn taken in execution may be distrained. See *Com Rep.* 204.

By act for the amendment of the law, 4 & 5 *Annæ*, It is lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence.

Provided, That if any such matter shall, upon a demurrer joined, be adjudged insufficient, costs shall be given at the discretion of the court. Or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify, that the said defendant or tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him. See more of *replevin* in the next chapter.

The

The plaintiff brought trespass in *C. B.* for taking an *excessive* distress, and on error in *B. R.* the judgment was reversed, for that trespass would not lie where the entry at first was lawful, and here is nothing subsequent to make it a trespass, as there is where the distress is abused. The remedy ought to be by special action founded on the statute of *Marleberge*, 3 *Lev.* 48. for at common law the party might make a distress of more value than the rent, so as to make it more eligible for the party to redeem the goods by payment of the rent. Here was some rent due, so a distress was lawful; and as it is but one act, it cannot be a trespass. *M. 3 Geo. 2. Lynne v. Moody*, 2 *Str.* 851. *Fitzgib.* 85. *pl.* 14.

“By stat. 4 *Geo. 2. chap.* 28. *sect.* 1. In case
 “any tenant for life or years, or other person
 “who shall come into possession of any lands,
 “tenements, or hereditaments, under, or by col-
 “lusion with such tenant, shall wilfully hold
 “over, after the determination of such term,
 “and after demand made in writing, for deliver-
 “ing the possession thereof, the person to whom
 “the remainder or reversion shall belong, or his
 “agent; such person holding over shall pay
 “double the yearly value of the lands, &c. so
 “detained, to be recovered by action of debt,
 “whereunto the defendant shall be obliged to
 “give special bail; against which penalty there
 “shall be no relief in equity.

An ejectment may be brought against a tenant who gives notice to quit at such a time, and does not quit accordingly, as well as when the landlord gives the tenant notice to quit.

If

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If an action be brought on the statute for double rent for two years holding over, the jury may find for so much as, upon the evidence, the tenant appears to have overheld beyond the term, provided they find not beyond what is laid in the declaration. *Trinity Term, 13 Geo. 3. B. R. Loft's Rep. 275, 276.*

If lessee hold over after notice from landlord, that in case of holding over beyond the day in the notice he shall pay an encreased rent, the holding over is an assent to the new rent, and the landlord shall recover it in an action for use and occupation. *Hilary Term 13 Geo. 3. B. R. Loft's Rep. 154, 155.*

The notice on this clause of the statute may be penned in the following form, viz.

Notice to Tenant to deliver up possession, or on refusal to pay double Rent, in pursuance of Stat. 4 Geo. 2. c. 28. s. 1.

Henry Chittick.

I Herely demand of you and give you notice, that you are to deliver up the possession of the house, with the appurtenances, in the parish of Pancras, in the county of Middlesex, now in your own occupation, to Thomas Young your landlord, at Christmas-day next ensuing the date hereof; and in default of your compliance herewith, the said Thomas Young doth and will insist on your paying unto him from thence forward for the same the yearly rent or sum of fifty pounds, being double the former rent or value thereof, for so long time as you shall detain the key, and keep possession

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possession of the said premises over the said no-
tices.*

*Given under my hand this tenth day of Septem-
ber in the year of our Lord 1777.*

*John Rayner for the said
Thomas Young, legally
To Henry Chittick, the tenant, empowered.*

But this remedy seemeth (says an able juri-
dical (1) writer of this country) not altogether
adequate to the evil; for three reasons. 1st. Be-
cause such action is certainly tedious and expen-
sive; 2d. It is uncertain, when the action is over,
whether the tenant will be able to pay; 3d. What
is chiefly wanted, namely, putting the landlord
into possession, is not obtained by such action,
but for that he shall be still to seek. A more short
and easy method of ousting the tenant of his pos-
sessions, seemeth the more eligible in the like cases.

The preamble to 4 Geo. II. c. 28. recites, that
great inconveniencies did frequently happen to les-
sors and landlords, in cases of re-entry for non-
payment of rent, by reason of the many niceties that
attend re-entries at common law; and forasmuch
as, when a legal re-entry was made, the landlord
or lessor must be at the expence, charge, and delay,
of recovering in ejectment, before he could ob-
tain the actual possession of the demised premises;
and that it often happened that, after such a re-
entry made, the lessor or his assignee, upon bills
filed in a court of equity, not only held out the

(1) See Dr. Burn, in his juf. 467.

lessor

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lessor or landlord by injunction, from recovering the possession, but likewise, pending the said suit, did run much more in arrear, without giving any security for the rent due, when the said re-entry was made, or which should or did afterwards incur, the statute enacts,

By *Stat. 2.* In all cases between landlord and tenant, as often as one half-year's rent shall be in arrear, and the landlord hath right by law to re-enter for non-payment, such landlord may, without any formal demand or re-entry, serve a declaration in ejectment; or, in case the same cannot be *legally served*, affix the same upon the door of any demised messuage, or upon some notorious place of the lands, &c. comprised in such declaration; which service, or affixing such declaration, shall stand instead of a demand and re-entry; and in case of judgment against the casual ejector, or nonsuit for not confessing lease entry and ouster, it shall be made appear to the court *by affidavit*, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the declaration was served, and no sufficient distress was to be found, and that the lessor in ejectment had power to re-enter; the lessor in ejectment shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made.

Upon an attentive and considerate perusal of all the cases in the reports, it does not seem very clear, whether the contents of the declaration, as well as those of the subscription thereto, ought to be read at the time of service. This contrariety

of

of opinion induced us to have recourse to the *affidavit of service*, but even *that* did not satisfy our doubts, for the precedents thereof do not appear at all to us uniform; however the following rules or dogmas, with the several restrictions and limitations by us noted, seem now to be settled and established by the practice of both courts.

1. That the contents of the declaration, as well as of those of the notice of the casual ejector, to the tenant in possession, be so signified and explained by the party serving, to the party served, as to be fully understood by the latter; be the service on the tenant or any other person.

2. That the service be always on the premises in question, except only when the tenant is served *personally*, in which case it need not.

3. That by the practice of the court of *Common Pleas*, in every case of service of the declaration, in the absence of the tenant; (the cases of serving the tenants father, (see *Roe*, on the demise of *Jefferyes*, v. *Doe*) or his daughter (see *Scrape* v. *Hunt*; *Goodtitle* on the demise of *Massa* v. *Thrustout*) or his sister, (see *Goodlad*, lessee of *Roundel*, v. *Jefferson*) with those of *deserted* possessions, and those specially provided for by this clause of the statute, always and only excepted) that there must be a tender of the copy to, and a refusal thereof by the tenant, at the time of attempting to serve it, either proved or confessed: and that a bare acknowledgement by the tenant of the receipt of the copy, will not be deemed sufficient; (except as before excepted) see *Kirwood*,

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wood, lessee of *Bratt v. Backhouse*. But the practice of the court of *King's Bench* doth not seem to require any acknowledgement at all, that court being satisfied with a mere tender only. See *Salk.* 255.

4. That a true and examined copy of the declaration on a treble penny stamp sheet of paper, must be served on or before the *Essoign-day* of the then next term, 3 *Com. Dig.* 249. See *Goodlad*, lessee of *Raundel*, v. *Jefferson*; *Roe* on the demise of *Bird*, v. *Doe. Barnes* 172, 173. and *Goodtitle*, on the demise of *Massa*, v. *Thrustout*, otherwise the plaintiff cannot have judgement till the subsequent term; and the reason is, because the declaration is the first process, *Michaelmas Term*, 7 *Geo.* 2. 1734. *C. B. Roe* on the demise of *Bird* v. *Doe. Barnes* 173. but the copy must not be served on a *Sunday*, for the same reason, *Comb.* 462. 12 *Mod.* 667. and tho' *Comb.* 286. is *contra*, yet the law is so at this day.

In order that the reader may obtain a competent knowledge of the legal service of a declaration in ejectment, we will distinguish the remaining part of the subject under the following divisions:

1. Service on the tenant, when in possession.
2. In his accidental absence, and,
3. In his wilful absence, or on his absconding.

1. Service on the tenant in possession.

Personal service on the tenant in possession himself, is held the most legal, and such service may

be any where, even off the premises in question. 2 *Sira.* 1064. *Loft's Rep.* 301. *Bul. Nisi Pri.* 95. S. P. and where there are joint tenants they ought both to be served, at least where they live in in separate houses. *Trin. Term* 13 *Geo.* 3. *B. R. Loft's Rep.* 301.

On tender of a copy of the declaration, the servants of the tenant in possession refusing to call their master, or to receive it, declaring they had orders to take no papers; leaving the copy at the house of the tenant in possession, held sufficient by the court of *King's Bench*. *no Stra.* 575. See *Cas. Temp. Hardw.* 164.

Declaration was tendered to tenant in possession, which she refusing to accept, it was left on the floor, in her presence; and she retiring into the parlour, and shutting the door, the person serving read the subscription aloud; so as she might hear it; which was held sufficient service by the court of *Common Pleas*. *Hilary Term*, 16 *Geo.* 2. 1743. *C. B. Bagshaw* on the demise of *Ashton, v. Toogood*, *Barnes* 185.

Tenant in possession refused to accept the declaration, when tendered to him; being made acquainted with the contents of it; he brought a gun and swore he would shoot the person who tendered the declaration, if he did not get off his land; whereupon the declaration was laid down on the ground, in presence of the tenant in possession and his men, whom the tenant ordered not to take it up. All the judges of the court of *Common Pleas* (comparing this case to that of a continual claim, where the party comes as near the land as he can to make his claim, for fear of

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his life) were of opinion, that these circumstances amounted to good service. *Easter Term, 7 Geo. 2. 1734. C. B. Halsat* lessee of lord Leigh, v. *Wedgewood. Barnes* 174. *Co. Cas.* 100. The chief justice *Eyre* — in *S. C.* said, it would have been a good delivery, if there had been no violence offered, since the declaration was tendered, refused, and left on the premises, in the tenant's presence. *Rich. Reg.* 167.

Service of a deaf and dumb woman, tenant in possession of premises, with a declaration in ejectment, by signifying to her the meaning and contents of such declaration, and the notice subscribed, by means of a person who explained the same to her by significant signs which she understood, as the person explaining made affidavit. *Rule Nisi, Hilary Term 22 Geo. 2. 1749. C. B. Goodtitle*, on the demise of *Wellsell* esq; v. *Badgley. Barnes* 168. 169.

Tenant in possession was personated at the time of the service by another, who accepted the service in her name; the court of *King's Bench* made a rule to shew cause, why it should not be deemed good service on the tenant herself, and that leaving a copy of the rule at her house with some person there, or (if no person to be met with) affixing it on the door, should be deemed good service thereof. *Trinity Term 1 Geo. 3. 1761. B. R. Ferris*, on the demise of *Turrell* & Co. v. *Damm*. 2 *Bur. Rep.* 1181.

2. Service in the tenant's accidental absence. In case the tenant cannot be met with from mere casual absence, a copy of the declaration may be

left with his wife, and with her only. *Lil. Reg.* 589, 675, 5 *Com. Dig.* 249.

Formerly it was said, that the copy of a declaration in ejectment, might be left with a (1) servant of the tenant in possession, the proceedings being in the court of *King's Bench*. See 12 *Mod.* 313. which is the practice of the court of *Common Pleas* at this day. See *Comb.* 47. but the lord *Hale* altered the rule, and *Holt* thought it a very good alteration, and saw no reason why the court of *Common Pleas* should allow it, and said, that the law had always been tender of a man's possession, but that the copy might be left with the tenant's wife. (2)

When a *lunatick* is to be turned out of possession of his estate, Mr. J. *Ash* said, (in the absence of earl *Manfield*) that it was necessary to serve the committee, appointed and empowered under a commission, to take care of his estate. *Hil. Term*, 14 *Geo.* 3. *B. R. Lofft's Rep.* 401. See *Post* 178.

The wife of the tenant in possession of the messuage in question, on a person's knocking at the door of the house, in order to serve the declaration, opened a wicket in the door, and

(1) *Bur. Rep.* 615, &c.

(2) Mr. J. *Ash*, in the absence of earl *Manfield*, observed, that the ground in common cases, of service of an ejectment on a servant, being deemed good service, was, because it is presumed to come to the notice of the master. *Hil. Term* 14 *Geo.* 3. *B. R. Lofft's Rep.* 401. the present lord chancellor (earl *Bathurst*) says, there must be some acknowledgement of the tenant's having received it. *Bul. Ni. Pri.* 95.

(3) *Easter Term*, 1 *W & M. Anon.*

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looked thro' it; but refusing to open the door, she was then acquainted with the contents of the declaration, and the *English* subscription was read to her; and immediately after and before the declaration could be tendered to her, she shut the window: whereupon the declaration was fixed upon the door. The service was held *insufficient*. The court of *Common Pleas* was divided, so no rule was made. Chief justice *Eyre* and *Denton* j. were of opinion, that it was not a good service, and *Price* and *Fortescue*, justices, held the contrary. *Michaelmas Term*, 6 *Geo.* 2. 1733. *C. B.* *Kirwood* lessee of *Brace*, v. *Backhouse*. *Barnes* 171. who takes no notice of the court's being divided. *Co. Cas.* 75. *Rich. Reg.* 165.

It not appearing that the copy was tendered to the wife, seems to have occasioned the division of the court. See *Doe* on the demise of *Dry*, v. *Rae*, in *Hilary Term*, 10 *Geo.* 2. 1737. *C. B.* where the service was held sufficient, in just such a case as the above, the copy being tendered to the wife of the tenant. *Barnes* 178. See also *Hassal* lessee, &c. v. *Wedgerwood*; and *Bagshaw* on demise of *Ashton* v. *Toogood*.

Tenant acknowledged that he received the copy of the declaration from his father, and held by the court of *Common Pleas* a good delivery. *Hilary Term*, 8 *Geo.* 2. 1735. *C. B.* *Rae* on the demise of *Jessy*, v. *Doe*. *Co. Cas.* 113. *Barnes* 176.

The copy of the declaration was delivered to the tenant's daughter, who was made acquainted with the contents thereof; the tenant afterwards acknowledged the receipt of it; court of *Common Pleas* held the service sufficient. *Hilary Term*, 8 *Geo.*

Geo. 2. 1735. C. B. *Scraps, v. Hunt. Barnes*
175. Co. Cas. 115.

Tenant upon a Sunday acknowledged the receipt of the copy of the declaration, which before the *Effoign-day* had been delivered to his daughter, and she acquainted with the contents thereof; this was held sufficient service by the court of *Common Pleas*. *Trinity Term* 16 Geo. 2. 1743. C. B. *Goodtitle on the demise of Massa v. Thrusfont. Barnes* 183.

The tenant's sister was served, and acquainted with the contents of the declaration, before the *Effoign-day* of the term, and after that the tenant acknowledged that he had received the copy; the court of *Common Pleas* granted a rule *Nisi* for judgement against the casual ejector. *Trinity Term* 13 Geo. 2. 1740. C. B. *Goodlad lessee of Roundel, v. Jefferson. Rich. Reg.* 167.

Tenant a lunatic, living with one *Major* who transacted her business, and had the sole conduct thereof, and of her person; the tenant not permitting the party to have access to her, with copy of declaration; whereupon it was delivered to *Major*; the court of *Common Pleas* made a rule, that the tenant and *Major* should both shew cause why this service should not be good, and why service of the rule granted on him, should not be deemed good service thereof. *Trinity Term* 26 & 27 Geo. 2. 1753. C. B. *Dee on the demise of Wright, v. Ros. Barnes* 190, 193. See ante 176.

Party tendered copy of declaration to the wife of the tenant in possession in the shop, and would have read to her the notice to appear, but she refused to hear it, or to receive the declaration, and said she would have nothing to do with it, and turned

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turned out of the shop, and shut the door after her, whereupon the declaration was left in the shop. The court of *Common Pleas* thought this not quite sufficient service, as the notice ought to have been read aloud in the shop, tho' no person was there; but as this was an hard case, they made a rule to shew cause, why this should not be deemed good service. *Easter Term 3 Geo. 3. 1765. C. B. Will. 262. Doe on the demise of Neale, v. Roe.*

3. Service on tenant his wilful absence, or absconding.

Service of an ejectment on a servant is not good service, as was solemnly determined in *Douglas's case*; there the servant was served on the master's absconding; and the court of *King's Bench* thought that not sufficient to found the common rule upon, though indeed upon affidavit of the absconding of the master, the court did make a rule that leaving the declaration with the servant should be good service of the master. *Cap. Temp. Hardw. 164.* but the court of *Common Pleas* held that such service on the servant, together with a copy of the declaration fixed on the street-door, was sufficient.

Tenant having no wife and being absconded, the service of the copy of the declaration was upon his maid servant, and she was desired by the person who served it to give it her master; she accordingly did give it her master, who said he would take care of it; upon these circum-

† *Hilary Term 3 Geo. 2. 1734. C. B. Smalley v. Neale. Barnes 173.*

stances the court of *King's Bench* was of opinion, that this was a good service. *Trinity Term 6 Geo. 2. 1733. B. R. Woodby v. Holdfast. 2 Barnard. B. R. 311.*

It appearing that the tenant in possession, and his wife, both absconded, and could not either of them be served with a copy of the declaration; and that they had left a woman servant in the house on the premises, in whose presence a declaration was fixed up; the court of *Common Pleas* made a rule for the tenant to shew cause why service of the declaration on his servant, at his house, should not be deemed good; and directed the rule, *nisi* to be served in that manner. *Hil. Term 21 Geo. 2. 1748. C. B. Anon. Barnes 188.*

A like rule was made by the court of *King's Bench*, to shew cause why a preceding service (if the rule was not thus made with a *retrospect*, the plaintiff must loose the assizes) of an ejectment upon a servant in the house of the tenant in possession should not be deemed a good service of it; on its appearing that the tenant in possession and his wife both kept out of the way, to prevent their being personally served. *Trinity Term 1 Geo. 3. 1761. B. R. Goodright, on the demise of Marshall v. Noright. 2 Bur. Rep. 1181. in Marg.*

Tenant a single woman absconded, and sequestered herself in the messuage in question, and could not be personally served; rule to shew cause why service of the servant, at the house, should not be good, the rule granted to be served on the servant, at the house. *Easter Term 22 Geo. 2. 1749. C. B. Short, on the demise of Elmes v. King. Barnes 188.*

Tenant who came into possession surreptitiously absconded to avoid being served, a copy of declaration

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ration was delivered to the tenant's son, her servant, and the manager of her affairs, and who lived in her family; the court of *Common Pleas* made a rule that she should shew cause, why such service on her son and servant should not be deemed good service, as also the leaving a copy of the rule granted at her house, which was made absolute, no cause being shewn. *Hilary Term 26 Geo. 2. 1753. C. B. Rep.* on the demise of *Fearnly & Tancred, v. Doe. Barnes 190.*

The like rule was made by the same court in *Trinity Term 27 & 28 Geo. 2. 1754. C. B. Fenn* on the demise of *Knights v. Dean. Barnes 192.*

Tenant in possession absconding, and plaintiff having personally served his niece, the only manager of his house, and residing in it, and having also fixed up another copy of the declaration upon the premises; the court of *King's Bench* made a rule to shew cause, "why judgment should not be entered up against the casual ejector;" and further ordered, that notice of such rule to any person in the house should be sufficient; or, if no person be in the house, then to be affixed to the door, &c. this rule on a proper affidavit was made absolute. *Hilary Term 1 Geo. 3. 1761. B. R. Sprightly,* on the demise of *Collins, v. Dunch. 2 Bur. Rep. 1116. Loff's Rep. 266, 273. S. P.*

The tenant keeping out of the way to prevent being served, the court of *Common Pleas* made a like rule as they did in the case of *Doe*, on the demise of *Neale, v. Roe, Wils. C. B. 263.* that seems hardly possible. See the rule referred to above.

Upon a motion on this clause of the statute for judgment in ejectment, the court of *Common Pleas* said, that it was not sufficient for the lessor

lessor of the plaintiff, to say generally in his affidavit, that he hath a right to re-enter, but he must shew how he hath such a right; but there is no occasion to produce the lease in court upon the motion, an affidavit of the facts being sufficient; a proper affidavit of the facts required by this clause of the act to be proved, being produced, the court made the usual rule for judgment.

The proper affidavit of facts required in this case, is in substance as follows, that the copy of a declaration in ejectment was fixed upon such a place (naming on what part of the premises) being the most notorious part of the premises in question, (there being no person in possession on whom the declaration could be legally served, or that the premises were untenanted; as the case may happen to be) that half a year's rent was due and in arrear from the late tenant, before the declaration served, that no sufficient distress was to be found on the premises, countervailing the arrears of rent then due, that the late tenant was in possession of such premises, by virtue of a lease from the lessor of the plaintiff; and that therein is contained a covenant by which the lessor of the plaintiff had and now hath a power of re-entry for non-payment of that rent. *Hilary Term, 5 Geo. 2. 1731. C. B. Mouldon, on the demise of Camden, v. Wrangham. Co. Cas. 68. Rich. Reg. 168, 169.*

Ejectment upon condition of re-entry for non-payment of rent; judgment being moved for against the usual ejector. It was objected that this clause of the statute required an affidavit to be made that rent was in arrear, &c. the lessee insisted (being a peer) that an affidavit on honor ought to be taken, but afterwards submitted to make it upon

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upon oath, *salvo semper privilegio*. Lord Cuninghly's case 8 Mod. 192. was remembered, where an affidavit upon honour was refused by this court, in L. C. J. Pratt's time. Easter Term 5 Geo. 2. 1731. B. R. L. Cadogan v. Cottis. 2 Kel. 681 p. 25.

Motion 23 Nov. for judgment in ejectment, where there was a vacant (1) possession, it was objected, that the motion came too late, that it should have been moved within a week after the beginning of the term according to the old rule concerning motions in ejectment, made Trinity Term 32 Car. 2. but upon reading thereof the court of Common Pleas was of opinion, that vacant possessions were not within the meaning of that rule, and that ejectments on vacant possessions in London or Middlesex, on Stat. 4 Geo. 2. c. 28. s. 2. might be moved for at any time in term, and that they were not within the said rule of Charles the Second, which relates only to declarations in ejectments served upon tenants in possession, and therefore granted a rule for judgment Michaelmas term 6 Geo. 2. 1733. C. B. Negative, lessee of Parsons v. Positive. Co. Cas. 76. Barnes 172. Rich. Reg. 169.

Motion in ejectment for judgment against the casual ejector, and granted, upon affidavit that the messuage in question being empty and the door shut, one Brown did enter thereon, by taking hold of the knocker and standing on the threshold, and being there in possession, did there seal a lease to Bidgood, and Brown delivered possession by taking hold of the knocker, &c. and af-

(1) A natural philosopher would be apt to think that "a vacant possession" was rather a contradiction in terms. Would not the expression "a deserted possession" avoid the absurdity?

terwards *Hawes* dispossessed *Bidgood* by taking hold of the knocker, &c. and then the deponent delivered an ejectment to said *Hawes*. *Easter Term 8 Geo. 2. 1735. B. R. Bidgood & Hawes. Cas. Temp. Hardw. 112.*

In ejectment the objection was, that the affidavit on which the plaintiff moved against the casual ejector was upon *Stat. 4 Geo. 2. c. 28.* that so much rent was behind, and no distress on the premises, but when they came to the trial the plaintiff dropped that pretence, and set up another title, which misled the defendant, who was come to make defence on the footing of the affidavit; and therefore defendant's council prayed a new trial.

Lord Hardwicke (1) c. just, said this was matter of irregularity, as it appeared to him, but he apprehended that the defendant had waived it, by making a defence at the trial, for if there had been an irregularity in serving the ejectment in the notice of trial, the making defence would cure it.

Page, (1) J. doubted whether the act intended to bar the plaintiff of making any other title; but that, supposing it did, it was waived by the defence.

Probyn, (1) J. doubted whether, as plaintiff had brought the ejectment on this act of parliament, the defendant need come prepared to make any other defence, for this is a particular sort of ejectment, but then there should have been no defence.

Lee, J. did not see but that, notwithstanding the direction of the act of parliament, the plaintiff might insist on any other title, but if he did then

(1) *Cas. Temp. Hardw. 108.* But see *Pars* on the demise of *Withers, & al. v. Sturdy*, which seems directly contrary.

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he had not made a regular service for such an ejectment; and besides, the defence waives it all, so that he thought this should be a motion for irregularity, rather than a new trial. *Easter term 8 Geo. 1735. B. R. Kempton, on demise of Bassfield, v. Cross. Cas. Temp. Hardw. 109.*

Motion was made 28 Oct. this term, for judgment in *London* on a *vacant* possession, where the notice to appear was not on the first day, but in the beginning of *Michaelmas Term*; the court of *Common Pleas* said the beginning of the term was uncertain, and therefore gave the defendant till 6 Nov. to appear and plead, and made a rule for judgment, unless some person claiming title appeared & pleaded within four days. *Michaelmas Term 8 Geo. 2. 1735. C. B. Threddell v. Trowiss. Barnes 175. Co. Cas. 108.*

Motion that those persons who claimed title to lands and tenements in the country of *Middlesex* (the possession whereof was vacant) might be informed by Mr. *Banister* (attorney for a person who was carrying on a proceeding in ejectment in the old way, under a lease sealed upon the premises) of the names of the parties in that ejectment, in order that *Beauchamp* and *Burt* might appear and defend the title. It was urged for *Banister*, that in all cases of vacant possessions, unless such as are within this act of parliament concerning landlords & tenants by lease, with a clause of re-entry, no instance can be shewn where any person claiming title hath been let in to defend, but he that can first seal a lease upon the premises, must obtain possession, and any other person claiming title may eject him if he can; and by the course of the court of *Common Pleas* no defence can be made in

in these cases but by the defendant in the ejectment, who is a real ejector; the court took time to consider of the matter, but never made any rule. *Trinity Term 10 Geo. 2, 1737. C. B. Ex parte Beauchamp v. Ryt. Barnes.* 177.

The lessee of a public house, had gone from the demised premises, taken another house, and removed his goods and family, but had left beer in the cellar; the term was still continuing, and there being only a quarter's rent in arrear, the lessor of the plaintiff, enters as upon a vacant possession, and seals a lease on the premises, in order to bring an ejectment; and accordingly delivers a declaration, and obtains judgment.

The question was, whether this be such a vacant possession, as the lessor could enter upon and seal a lease, in order to bring an ejectment.

By the court, it is not; for several goods are left; it should be quite a relinquishing the house, and taking away the goods, to bring it within the rule at common law, of making a lease upon vacant possession; for it hath been held, that leaving hay in a barn is keeping possession: besides the term is continuing, and no proof that the lessor absconded, as only a quarter's rent due, this cannot be considered a proceeding within *Stat. 4 Geo. 2. Chap. 28.* Judgment set aside, and possession restored. *Mich. Term, 1736, 9 Geo. 2. R. B. Savage v. Dent. MS. Rep. S. C. in 2 Stra. 1064.*

The (1) end and intent of this clause of the statute was to limit and confine the tenant to his kalendar months, after execution executed, for offering

(1) So said by L. Mansfield. *Bur. Rep.* 619, 620.

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compensation, or applying for relief in equity. *Trin. Term 31 Geo. 2. 1758. B. R. Doe on the demise of Hitchings and anr. v Lewis etq. Bur. Rep. 614.*

This clause of the statute seems to relate only to (1) ejectments for non-payment of rent, where the landlord hath a right to re-enter.

By sect. (2) 4. If the tenant shall, at any time before trial in such ejectment, tender to the lessor, his executors or administrators, or his attorney in that cause, or pay into court, all arrears with costs, all proceeding in the ejectment shall cease.

After judgment against the casual ejector, and before any writ of possession executed, the court of *King's Bench* made rule to stay proceedings on payment of all rent due and costs: it not being pretended that the ejectment was brought on any other title, than a re-entry for non-payment of rent. *Easter Term 4 Geo. 2. 1731. Goodtitle v. Holdfast. 2 Stra. 900.*

Lessor of the plaintiff were both devisees and executors, and in each capacity rent was due to them; defendant moved to stay proceedings, upon payment of the rent due to the lessors of plaintiff as devisees, they not being intitled to bring an ejectment as executors, there appeared to be a mutual debt due to defendant by simple contract, and defendant offered to go into the whole account,

(1) 5 *Com. Dig.* 248.

(2) It is the observation of one of the present judges, that this provision is in some measure copied from the ancient writ of *cessavit*: especially as it may be satisfied and put an end to, in a similar manner, by tender of the rent and costs, in six months after. 3 *Black. Com.* 233.

taking

taking in both demands as devisees and executors, having just allowances; which lessors of plaintiff refused. The rule was made absolute to stay proceedings, on payment of the rent due to lessors as devisees, and costs. *Duckwork*, on the demise of *Jubley* and others against *Tunstal*. Barnes. 184.

In an action of covenant upon a lease the breach assigned was for non-payment of rent, and not repairing the premises; it was now moved that upon payment of what shall appear due for rent, proceedings as to *that* shall stay. *Per Curiam*, this has often been done, so let it be referred to the master. *Easter Term 17 Geo. 2. 1744. C. B. Anon. Wilh. B. R. 74.*

In ejectment by a landlord, the tenant moved to stay proceedings upon payment of rent arrear and costs. On a rule to shew cause it was insisted for the plaintiff, that the case was not within the act, for that it was not an ejectment founded singly on the act, but that it was brought likewise on a clause of re-entry in the lease for not repairing; and the lease was produced in court: however the rule was made absolute, with liberty for the plaintiff to proceed upon another title. *Hilary Term. 25 Geo. 2. 1752. Purse*, on the demise of *Withers & al. v. Sturdy*. *Bul. N. Pr. 95.* but see *Coff. Temp. Hardw. 108.* which seems *contra*.

Lee (1) Ch. Just. said, that before *Stat. 4 Geo. 2.* the court of *King's Bench* exercised this discretionary power in the case of a forfeiture for non-payment of rent, in which case the court, according to the rules of equity, did stay the party

(1) *Andr. 345. 8 Mod. 345. 10 M. d. 383. 2 Salk. 597. Bul. N. Pr. 95.*

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from proceeding at law, by compelling him to take the money really due to him; and my lord (1) Chancellor observes, that the courts of justice had done this antecedent to this act.

Landlord must not receive any (2) rent after ejectment brought, nor till the same is determined; if he does, it is a waiver of the trespass, on which such action is grounded, and he will be nonsuited on the trial for so doing. 2 *Bur. Rep.* 668.

In ejectment brought on demise of an infant, court, at defendant's request, will stay proceedings till a sufficient plaintiff be named, or some person will undertake, on behalf of the infant, to pay such costs as shall be adjudged to defendant. *Stra.* 694. 2 *Stra.* 932. *Tri. at N. Pl.* 105. 2 *Keb. Rep.* 65. 2 *Barnard. B. R.* 140. *Will. Rep.* 130. 2 *Bur. Rep.* 1117. *all S. P.*

“By sect. 2. in case the lessee or his assignee, or
“other person claiming or deriving under the
“said leases, shall suffer judgment and execution to be executed thereon, without paying
“the rent and arrears, together with full costs,
“and without filing any bill for relief in equity,

(1) *Bul. Ni. Pr.* 95.

(2) The landlord's remedy for the rent in arrear, is by action for the mesne profits. 2 *Bur. Rep.* 668. which may be brought either by the plaintiff in the ejectment, or by the lessor or lessee; where it is brought by the plaintiff, he need, on the trial, only produce the *possession* of the recovery, and not prove his entry, because defendant confesses that by the rule, and it is also found by the verdict against him; but where the lessor or lessee brings the action, he must prove his title over again, if insisted on by the other side, else he will be nonsuited. 3 *Will. Rep.* 118. 2 *Bur. Rep.* 668.

“within

" within six months; then said lessee or his af-
 " signee, and all other persons claiming under
 " the said lease, shall be barred from all relief
 " other than by writ of error, for reversal of
 " such judgment, in case the same shall be er-
 " roneous; and the said landlord shall from
 " thenceforth hold the said demised premises dis-
 " charged from such lease; and if on such eject-
 " ment verdict shall pass for the defendant,
 " or the plaintiff shall be nonsuited therein,
 " except for defendants not confessing lease, en-
 " try and ouster, then such defendant shall have
 " his full costs; Provided, that nothing herein
 " contained shall extend to bar the right of any
 " mortgagee of such lease, or any part thereof,
 " who shall not be in possession, so as such
 " mortgagee do, within six calendar months af-
 " ter such judgment obtained, and execution
 " executed, pay all rent in arrear, and all costs
 " and damages sustained by such lessor, person
 " or persons intitled to the remainder or reversion
 " as aforesaid, and perform all the covenants
 " and agreements, which on the part and behalf
 " of the first lessee or lessees are and ought to be
 " performed."

This section of the act prescribes two manners
 of recovering in an ejectment brought by the
 landlord: viz. by default, and on trial; in both
 which, it must be made to appear, " That half a
 " year's rent was due, that there was no sufficient
 " distress, and that the lessor had power to re-
 " enter in the former case of judgement against
 " the casual ejector, (and so also upon nonsuit
 " on not confessing lease, entry and ouster); this
 " must be made to appear by affidavit; in the
 " latter

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“ latter case the same thing must be proved upon trial. This is a very different case from that of the defendant in an action for the mesne profits, not being estopped from going into the title, by a judgment against the casual ejector (to which judgment he was not a party).”

By lord chief justice *Mansfield*. *Bar. Rep.* 620.

Ejectment brought by a landlord against his tenant on *Stat. 4 Geo. 2. c. 28. §. 2.* who had judgment against the casual ejector by default, and possession thereof delivered; near twenty years after which, the tenant brings an ejectment against the same landlord for the same premises. The landlord is not obliged to produce the affidavit. *Bar. Rep.* 615, 617, 618, 619, &c.

“ In case the said lessee or his assignee, or other person claiming any right, title or interest to the said lease, shall, within the time aforesaid, file a bill, such person shall not have or continue any injunction, unless he do, within forty days next after a full and perfect answer filed by the lessor of the plaintiff, bring into court, and lodge with the proper officer, such sum of money as the lessor of the plaintiff shall in his answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord, on good security, subject to the decree of the court; and in case such bill shall be filed within the time aforesaid, and after execution is executed, the lessor of the plaintiff shall be accountable only for so much, and no more, as he shall really and *bona fide* without fraud, deceit or wilful neglect, make of the demised premises,

“ misses,

“ misses, from the time of his entering into the
 “ actual possession thereof; and if what shall be
 “ so made by the lessor of the plaintiff, happen
 “ to be less than the rent reserved on the said
 “ lease, then the said lessee or his assignee, be-
 “ fore he shall be restored to his possession, shall
 “ pay such lessor or landlord what the money so
 “ by them made, fell short of the reserved rent,
 “ for the time such lessor of the plaintiff or land-
 “ lord held the said lands, *f. 3.*

“ If the tenant or his assignee do, at any time
 “ before the trial in such ejectment, pay or ten-
 “ der to the lessor or landlord, his executors or
 “ administrators, or his attorney in that cause,
 “ then all further proceedings on the said eject-
 “ ment shall cease and be discontinued; and if
 “ such lessee or his executors, administrators or
 “ assigns, shall, upon such bill filed as aforesaid,
 “ be relieved in equity, he shall have, hold and
 “ enjoy the demised lands, according to the
 “ lease thereof made, without any new lease to
 “ be thereof made to him, *f. 4.*

“ All and every persons, bodies politick and
 “ corporate, may have the like remedy by dis-
 “ tress, and by impounding and selling the same,
 “ in cases of rents seck, rents of assize and chief
 “ rents, which have been duly answered or paid
 “ for three years, within twenty years last past,
 “ as in case of rent reserved upon lease. *f. 5.*

“ In case any lease shall be duly surrendered,
 “ in order to be renewed, and a new lease made
 “ and executed by the chief landlord, the same
 “ shall be as good as if all the under-leases had
 “ been surrendered; and every person, in whom
 “ any estate for life or years shall be vested by
 “ such

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“ such new lease, and his executors and administrators shall be intitled to the rents, covenants and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands and tenements, in the respective under-leases comprised, as if the original leases had been still continued; and the chief landlord shall have, and be intitled to, the same remedy, by distress or entry in and upon the messuages, lands, tenements and hereditaments, comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease, out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease, *Sect. 6.*

“ Nothing in this act contained shall extend to Scotland.” *Sect. 7.*

The end and intent of *Sect. 2.* of this act was to limit and confine the tenant to six kalendar months, after execution executed, for offering compensation, or applying for relief in equity. By lord chief justice *Mansfield.* *Bur. Rep.* 619, 620, 621.

The last acts being found not sufficient to remedy the inconveniencies that attended landlords; by an act of parliament was made 11 Geo. 2. c. 19. intituled, “ *An act for the more effectual securing the payment of rents, and preventing frauds by tenants.* In case any tenant

“ or lessee for life or lives, term of years, at
 “ will, sufferance, or otherwise, of any mes-
 “ suages, lands, tenements or hereditaments,
 “ upon the demise or holding whereof any rent
 “ is or shall be reserved, shall fraudulently or
 “ clandestinely convey away or carry off from
 “ such premises, his goods or chattels, to pre-
 “ vent the landlord or lessor from distraining the
 “ same for arrears of rent so reserved, due or
 “ made payable; every landlord or lessor, or any
 “ person by him impowered, may within thirty
 “ days next ensuing such conveying away or
 “ carrying off such goods or chattels as afore-
 “ said, take and seize such goods and chattels
 “ wherever the same shall be found, as a distress
 “ for the said arrears of rent; and the same to
 “ sell, or otherwise to dispose of in such man-
 “ ner as if the said goods and chattels had ac-
 “ tually been distrained by such lessor or land-
 “ lord in and upon such premises for such ar-
 “ rears of rent. *Sect. 1.*

“ No landlord or lessor, or other person in-
 “ titled to such arrears of rent, shall take or
 “ seize any such goods or chattels as a distress
 “ for the same, which shall be sold *bona fide*, and
 “ for a valuable consideration, before such sei-
 “ zure made, to any person not privy to such
 “ fraud as aforesaid. *Sect. 2.*

“ If any such tenant or lessee shall fraudu-
 “ lently remove and convey away his goods or
 “ chattels as aforesaid, or if any person shall
 “ wilfully and knowingly aid or assist any such
 “ tenant or lessee in such fraudulent conveying
 “ away or carrying off of any part of his goods

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“ or chattels, or in concealing the same; every
“ person so offending shall forfeit and pay to
“ the landlord or lessor from whose estate such
“ goods and chattels were fraudulently carried
“ off as aforesaid, double the value of the goods
“ by him carried off or concealed as aforesaid,
“ by action of debt in any of his majesty's
“ courts of record. *Stat. 3.*

By *Stat. 4.* “ If the goods and chattels so frau-
“ dulently carried off or concealed shall not ex-
“ ceed the value of fifty pounds, the landlord or
“ his agent may exhibit a complaint in writing
“ before two justices of the peace of the same
“ county or division, residing near the place whence
“ such goods and chattels were removed, or near
“ the place where the same were found, not be-
“ ing interested in the lands or tenements whence
“ such goods were removed; who may summon
“ the parties concerned, examine the fact and all
“ proper witnesses, upon oath (or, if it is a qua-
“ ker, upon affirmation required by law;) and in
“ a summary way determine whether such person
“ or persons be guilty of the offence with which
“ he or they are charged, and to enquire in like
“ manner of the value of such goods and chat-
“ tels; and upon full proof of the offence, by
“ order under their hands and seals, the said ju-
“ stices shall adjudge the offender or offenders
“ to pay double the value of the said goods and
“ chattels, to such landlord, his bailiff, servant or
“ agent, at such time as the said justices shall ap-
“ point: And if the offender or offenders, having
“ notice of such order, shall refuse or neglect so
“ to do, they shall by their warrant levy the same
“ by distress; and for want of such distress may
“ commit the offender or offenders to the house

“ of correction there to be kept to hard labour,
 “ without bail or mainprize, for the space of six
 “ months, unless the money so ordered to be
 “ paid as afore said shall be sooner satisfied.

Order made by two justices, reciting that a complaint had been made to them in writing, by *A. Clavey* against *J. Bissex*, that he the said *Clavey* demised his estate in the parish of *Shelley*, in the county of *Somerset*, to *William Thatcher*, at the yearly rent of forty-four pounds; and that there was due and in arrear from *Thatcher* to him for rent of the said estate, on the 5th day of *April* last, twenty-four pounds, fifteen shillings, and eight pence halfpenny; and that he the said *Clavey* would have distrained the goods and chattels of the said *W. Thatcher* upon the said estate, in order to obtain satisfaction of the said rent; but to prevent him from so doing, the said *Bissex*, on or about the 27th, 28th, and 29th days of *August* last, did knowingly and wilfully aid and assist the said *Thatcher*, in fraudulently conveying and carrying off from the said estate his the said *Thatcher's* goods and chattels, and also in concealing the same, being under the value of fifty pounds; that is to say, two cows, one heifer, and ten hundred weight of cheese, of the value of twenty pounds, whereby the said *Clavey* was prevented from distraining the same; in order to obtain satisfaction for the said rent, and contrary to this clause of the statute; and therefore praying us to grant him our warrant of summons, requiring you the said *J. Bissex* to appear before us, and that we would examine the fact, and thereupon make such order therein for his relief,

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as the said statute directs and requires, and as should be agreeable to justice: whereupon we the said justices, residing near the said estate from whence the said goods and cattle were removed, and neither of us any way interested in the said estate, did issue out our warrant of summons, requiring you the said *J. Biffin* to attend us thereon to answer the said complaint; and you having attended accordingly, and we in your presence having examined the witnesses produced by the said *A. Clavie* upon oath, and heard what was alleged by you in your defence, do adjudge that the said complaint is true; and that the said goods and cattle of the said *W. Thatchers*, in which you so aided and assisted in conveying and carrying off from the said estate, and also in concealing the same, were of the value of twenty pounds; and that you have thereby forfeited double the value of the said goods and cattle, being the sum of forty pounds, to the said complainant *A. Clavie*, by virtue of the said statute: We therefore, in pursuance of the said statute, do adjudge, order, and require you the said *J. Biffin*, within the space of three days from the date hereof, to pay to the said *A. Clavie* the sum of forty pounds; which if you shall neglect to do, such further proceedings will be then had against you to enforce the payment thereof, as the said statute directs and requires. Given under our hands and seals, this 5th day of January 1756. This order was affirmed by the sessions upon appeal. Both the orders were removed by *certiorari* into the King's Bench. It was moved to quash the same. Objections taken: 1. The complaint is said to be taken in writing, but not upon oath.

2. It is only said, that he demised to *W. Thatcher*, but not said for what estate or term. 3. It is stated, so much was due for rent, but not said for what term; it might be due 20 years ago; it is not stated to be due, when *Thatcher* moved his goods. 4. The words of the order are, goods and cattle; of the statute goods and chattels. 5. No certain time is alledged when the defendant aided and assisted; only said, on or about the 26th, 27th, or 28th of *August*. 6. Not stated that *Thatcher* did carry off his goods; only that *Bissex* did aid and assist him in carrying them off. 7. They adjudge the complaint true, but do not state the evidence; and this is a conviction, not an order; and, for any thing that appears, it might be upon *Clay's* evidence alone. 8. It is not stated that the goods were under the value of fifty pounds, which is the ground of the justices jurisdiction. 9. The words of the statute are, if any person shall be a tenant of any lands, tenements, or hereditaments: the word used in the order is *flat*, which may be a thing incorporate, or may mean the interest in the land, and so not within the statute. 10. It should appear, whether the landlord has a right to distrain: by the 8 *An. c. 14.* the landlord may distrain at any time within six months after the expiration of the term; it doth not appear these six months were not expired; and if they were, this is no offence. After consideration, Mr. *Just. Denison* delivered the resolution of the court: I think the most material objection is, whether this is an order or a conviction; if a conviction, the evidence ought to have been set out. And there

has.

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has been no doubt (notwithstanding the case of *K. & Pulleine, Salt. 369.*) that in a conviction the evidence must be set out, that the court may judge upon it. So it was held by lord *Hardwicke* in the case of *K. & Lloyd, Stra 996.* and in that case it was objected, that as it subjected the party to a penalty, tho' in the statute it was called an order, yet it should be construed as a conviction: but the court said, every act of the justices, which subjects the party to a penalty, shall not be construed as a conviction. *K. & Venable Stra. 630. 2. L. Raym. 1406.* upon the statute for licensing alehouses, considered as an order. *K. & Blackwell M. 4 Geo.* which the court said was a strong case, and must be considered as an order. I understood from my lord *Hardwicke*, in the case of *K. & Lloyd*, that this ground of the difference was founded upon the expressions of the statute, and not upon the penalty; as where the words of the statute are, "of which he shall be convicted," it is to be construed as a conviction. Here it is extremely strong; the statutes call it an order; and, in the nature of it, it is an examination upon a complaint. If the party was never summoned, this court, upon affidavit, will grant an information against the justices: but the summons need not be set out; and the court will intend the justices have done right, in case the contrary does not appear upon the face of the order. As to the first objection, this is not an information, but a complaint: when the party is summoned, the witnesses are to be examined upon oath, but the complaint need not be upon oath. In answer to the 2d objection, as the order has followed the words of the statute,

we will not intend it a case wherein the justices had not a jurisdiction. The court will not, in case of an order, intend that the justices have done wrong. As to the 3d objection, it is sufficiently alledged, in an order, his assisting the tenant to carry away the goods, as it is here alledged, is sufficient to shew the rent continued then to be in arrear; and the rather as the defendant might have availed himself of the rent paid, by proving it before the justices. I much doubt, whether in a declaration it would not be sufficient to say, the rent was in arrear at such a day; and I think it would lie upon the defendant to prove that the rent does not remain in arrear. As to its not being said, for what time the rent was due; this is mere matter of form. As to the 5th objection; *about*, in common parlance, means, in this case, three days or near it; they might be three days in carrying the goods away; the days are not material, even in legal proceedings. *L. Raym.* 581. And in the case of *K. & Simpson, H. 3 Geo. Stra.* 46. the day and hour in a conviction are not material. By this statute no time is limited when the complaint shall be made, he might easily have shewn it. As to the 6th, the answer is obvious; if *Thatcher* had not carried his goods away, the defendant could not have aided in carrying them. The statute makes two offences; one carrying the goods away; the other aiding in carrying them away: it is only necessary here to state the offence which the defendant had been guilty of, which this order does in the words of the statute. In the case of *K. & Monk, M. 13 Geo. 2.* there was a conviction for aiding and assisting in killing a buck.

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a buck. It was objected that it was not charged, the buck was killed. But the court held, that as the conviction was in the words of the statute, it was sufficient. And the court held they were all principals, as well those that killed the buck, as those that assisted. And this was the case of a conviction. All the other objections may have this general answer; that in the case of orders, where the justices have jurisdiction, we will intend they have acted right; and if they have acted wrong, they may be punished by an information. Let the orders be confirmed. *Trinity term, 29 & 30 Geo. 2. 17, 56. B. R. The King and Biffex. Burn's Justice, 434. Say. Rep. 304. S. C. S. P.*

Two justices make an order against one *Thomas Middlehurst*, for wilfully and knowingly aiding or assisting *John Chesterton*, the tenant of *Sir Thomas Fleetwood*, in fraudulently removing and conveying away five cows and other goods, or in concealing the same. Which order, on appeal to the sessions, was confirmed. It was moved to quash these orders upon two objections: 1. The whole adjudication refers to the complaint of one *Thomas Weston*, wherein there is no charge upon *Chesterton* the tenant at all: neither is it stated that *Chesterton* the tenant did remove the goods. 2. The act creates two offences, viz. assisting in removing, and assisting in concealing the goods. Now it is not specifically charged upon the defendant *Middlehurst*, that he wilfully and knowingly did either one of these two things: it is only alledged that he wilfully and knowingly did one or the other. In *Salk. 371. Rex v. Stocker*: An indictment for forging, or causing to be

he forged, was holden ill, because the charge was in the disjunctive. So, *Hawk. P. C.* 225. *sect.* 60. An indictment charging a man disjunctively, is void, for the offences are distinct, and it appears not with which of them the defendant is accused. So here, it doth not appear, for which of the two offences the justices have convicted him. On a rule to shew cause, to the first objection, that it is not described sufficiently what the offence is; it was answered, that this is an order, and the court will not intend it to be ill. To the second objection, as to the charge being in the disjunctive, that he assisted the tenant in removing or concealing the goods, it was answered, that the crime and the punishment were the same upon both; and the defendant was heard.—By Lord Mansfield, Ch. Just. Upon indictments, it hath been determined, that an alternative charge is not good (as forged or caused to be forged); though one only need be proved, if laid conjunctively (as, forged and caused to be forged); But I do not see the reason of it: The substance is exactly the same; the defendant must come prepared against both; and it makes no difference to him in any respect. But this is an order; and, being good in substance, need not be literally so strict.—And by the court, the rule to shew cause was discharged, and consequently both orders affirmed. *Trinity Term.* 30 & 31 *Geo.* 2. 17. 57. *B. R.* The King and Middleburst. *Bur. Rep.* 397. 398. *Burn's Justice,* 437.

“ Any person, who thinks himself aggrieved
 “ by such order of the said two justices, may
 “ appeal to the justices of peace at their next
 “ general

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“ general or quarter-sessions, who may and shall
“ hear and determine such appeal, and give such
“ costs to either party as they shall think reason-
“ able, whose determination therein shall be final.

“ *Sec. 5.*

“ Where the party appealing shall enter into
“ a recognizance with one or two sufficient sure-
“ ty or sureties, in double the sum so ordered
“ to be paid with condition to appear at such
“ general or quarter-sessions, the order of the
“ said two justices shall not be executed against
“ him in the mean time.” *Sec. 6.*

Had this statute fixed a time for the offender paying the penalty for removing the goods, it would have put it out of the power of either party to have complained of the discretionary power in this respect: the justices would then have had a rule to have gone by, the tenant could not have complained of the shortness of the time allowed him, nor the landlord that the justices had shewn the tenant too much indulgence, by granting him more time than the landlord could have wished.

Though this statute was made with a very good design, yet it strikes me, as having given too great a power to landlords, especially when they may recover their rents by other methods; if this mode of distress had been the only remedy, that would have been a very strong reason for arming him with this extraordinary power of *breaking open houses*; but as it is not, and the landlord may pursue other methods for recovering his rent, I confess I should have been glad to have had this power rather more confined; suspicion is a very poor apology for disturbing the peace of a family; besides, the power of
K 6
breaking

breaking open houses is a very dangerous one, and ought not to be trusted in any man's hands; it is impossible to see the inconveniencies that may arise from it; it may be applied to answer the worst of purposes.

Under these clauses of the act of parliament landlords have three methods of punishing such tenants, as fraudulently convey their goods and effects off the premises, to cheat them. One by distraining the goods so removed within thirty days after removal; another by action of debt, which may be made use of in all cases at the option of the landlord, whether the goods are or are not of the value of fifty pounds; and the third, where the goods removed do not exceed the value of fifty pounds, by a summary complaint exhibited before two justices of the peace, either in the neighbourhood whence the goods were removed, or near the place where they were found, the justices not being interested in the lands, &c. whence such goods were removed.

These two last methods may be adopted for the punishment of such persons, as aid and assist in the removal of the goods, or the concealment of them when removed; now as there are three distinct offences created by this act of parliament, I will observe upon each particular case; and first with respect to the tenant who removes the goods with such fraudulent intent, I take it, that in an action of debt against him, it will not be necessary for the prosecutor to produce such strict proof against him, as against those who aided and assisted him in such removal; but as this will depend so much upon circumstances, and the testimony of witnesses I will not take up time in ani-

malverting
32

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inadverting upon it, but proceed to observe upon the actions that may be brought against persons aiding and assisting in the removal or secreting of the tenants goods; and here I presume, that in order to support an action against these secondary offenders, it will be necessary for the plaintiff to prove that the tenant did, either by himself or others, remove the goods off the premises with a fraudulent intention; for it will be impossible for the plaintiff to convict any other person of aiding in a fraudulent removal, or concealment, till he has substantiated the fraudulent act of the tenant himself. I am sure, if I was a jurymen upon a trial of this kind, I would never find a verdict for the plaintiff, till evidence had been given of the fraudulent act of the tenant; for, as an honest man, I could not find any one guilty of aiding and assisting in the committing of a crime, which there never had been any proof of having been committed.

As to the mode of proceeding before the justices, there seems to be a very plain rule laid down by the statute, which requires that the complaint shall be in writing before two justices who have no interest in the premises, and who are required to summon the parties concerned, to examine the fact, and all proper witnesses upon oath, and in a summary way to determine whether the defendant be guilty of the offence; and the better to enable the justices to punish the party if guilty, the act particularly directs them to enquire in like manner of the value of the goods, &c. so fraudulently carried off or concealed; and upon full proof thereof by order under their hands and seals, to adjudge offenders to pay double the value

value of the goods, &c. to the landlord or his bailiff, within such time as the justices shall appoint; and upon notice of such order, and refusal to pay the money therein mentioned, the justices are impowered, by warrant under their hands and seals, to levy the same by distress and sale of the offender's goods, and for want of such distress to commit the offender to the house of correction for six months to hard labour, without bail, unless the money be sooner paid.— In the first place the complaint need not be upon oath, the act only requiring it to be in writing. In the next place, I apprehend, that as the penalty is given only to the landlord, if he was to make the complaint, and could not prove it, but by himself, tho' the king is the nominal prosecutor, yet he would be an incompetent witness from his being interested in the event of the prosecution; and that tho' the justices should proceed to a conviction upon his testimony only, yet, upon removal, the order would be quashed for want of legal proof of the charge; indeed that part of the statute which gives the justices cognizance of this matter, has been very particular and express, by requiring proper, by which I understand legal witnesses of the fact.

By *Stat. 7*: “Where any goods or chattles,
 “fraudulently or clandestinely conveyed or carried away, shall be put, placed, or kept in any
 “house, barn, stable, outhouse, yard, close, or
 “place, locked up, fastened, or otherwise secured, so as to prevent such goods or chattles
 “from being taken and seized as a distress for
 “arrears of rent; it shall be lawful for the landlord, or his steward, bailiff, receiver, or other
 “person or persons impowered to take and seize,
 “as

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“ as a distress for rent, such goods and chattles,
“ first calling to his assistance the constable,
“ headborough, boroughholder or other peace officer
“ of the hundred, district, or place, and in case
“ of a dwelling-house, oath being also first made
“ before a justice of the peace, of a reasonable
“ ground to suspect that such goods or chattles
“ are therein, in the day time to break open and
“ enter into such house, barn, stable, out-
“ house, yard, close, and place; and to take
“ and seize such goods and chattles for the said
“ arrears of rent, as he might have done if they
“ had been in any open place.

But except it be in this case where the goods are clandestinely conveyed, it may seem, from what hath been said, that the landlord hath no means to come at the goods in order to make distress, if the tenant shall think fit to lock up his gates, and shut the doors; which matter may seem to require some consideration.

“ Every lessor or landlord, or his steward,
“ bailiff, receiver, or other persons impowered
“ by him, may take and seize, as a distress for
“ arrears of rent, any cattle or stock of their
“ tenant, feeding or depasturing upon any com-
“ mon, appendant or appurtenant, or any ways
“ belonging to all or any part of the premises
“ demised or holden; and also may take and
“ seize all sorts of corn or grass, hops, roots,
“ fruits, pulse, or other product whatsoever,
“ which shall be growing on any part of the
“ estates so demised or holden, as a distress for
“ arrears of rent; and the same to cut, gather,
“ make, cure, carry and lay up, when ripe, in
“ the barns or other proper place on the pre-
“ mises

"misses so demised or holden; and in case there
 "should be no barn or proper place on the pre-
 "misses so demised or holden, then in any other
 "barn or proper place which such lessor or land-
 "lord shall hire, or otherwise procure for that
 "purpose, and as near as may be to the pre-
 "misses; and in convenient time to appraise,
 "sell, or otherwise dispose of the same, to-
 "wards satisfaction of the rent for which such
 "distress shall have been taken, and of the
 "charges of such distress, appraisement and
 "sale, in the same manner as other goods and
 "chattels may be seized, distrained and dis-
 "posed of; and the appraisement thereof to be
 "taken when cut, gathered, cured and made,
 "and not before. / 8.
 "Notice of the place where the goods
 "and chattels so distrained shall be lodged
 "or deposited, shall, within one week, be given
 "to such lessee or tenant, or left at the last
 "place of his abode; and that if after any dis-
 "tress for arrears of rent is taken of corn,
 "grass, hops, roots, fruits, pulse, or other
 "product which shall be growing as aforesaid,
 "and any time before the same shall be ripe and
 "cut, cured or gathered, the tenant or lessee,
 "his executors, administrators or assigns, shall
 "pay, or cause to be paid to the lessor or land-
 "lord, for whom such distress shall be taken,
 "or to the steward or other person usually em-
 "ployed to receive the rent of such lessor or
 "lessors, landlord or landlords, the whole rent
 "which shall be then in arrear, together with
 "the full costs and charges of making such dis-
 "tress, that then, the same and every part
 "thereof

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"thereof shall cease; and the corn, grass, hops, roots, fruits, pulse, or other product so distrained, shall be delivered up to the lessee or tenant, his executors, administrators or assigns."

Tho' this act of parliament hath enlarged the power of landlords, by giving them an authority to distrain a variety of things, they had no right of seizing before, yet as there seem some particularities necessary to be attended to, it will be extremely proper to mention them, lest by any omission the landlord become a trespasser.

If the distress consists of cattle taken upon a common appendant or appurtenant to the premises; I presume the landlord need only impound them, give the tenant notice, and then appraise and sell them, as in all other cases; but where it consists of corn, grass, hops, and the like *growing* on the premises; in that case, the landlord, after he has cut, gathered, cured, and made them, must lay them up in the barn, or other place on the premises, and, for want of a proper place to secure them in, may hire one as near as may be to the premises, and, within one week after depositing thereof in such place, must give notice to the tenant, and if he neglects to replevy them, the landlord, as in all other cases, may appraise and sell them; and here I take it, that tho' the act of parliament hath given the landlord a *week's* time, after depositing the corn, &c. in a barn or other proper place, to give the tenant notice, yet if he chooses to give such notice *immediately* after the corn, &c. is carried in, he lawfully may; but still I presume he cannot justify keeping it longer than five days after such notice

notice, tho' the statute hath given him a *convenient* (by which I understand the *usual legal*) time to proceed to sale. But if the tenant, after such seizure of the corn, &c. growing on the premises, at any time *before* the same is ripe AND cut, shall pay, or cause to be paid, to the lessor, landlord, steward, or other person usually employed to receive the rents of such lessor, the whole rent then in arrear, with the full costs of making such distress, and which shall have been occasioned thereby, then upon such payment or tender thereof, actually made, the distress is directed to cease, and the things taken ordered to be delivered up to the lessor or tenant.

And here let me observe, that tho' the statute is in the *conjunctive*, and directs the tender of the rent and charges to be made, *before* the corn is ripe AND cut; yet if a tender was to be made *after* the corn was ripe, and *before* it was cut, I apprehend it would be legal, for it often happens, that to remedy the evil intended, and in order to carry the spirit and intention of a statute into execution, courts of justice have considered the word AND a *conjunctive* as OR a *disjunctive*.

Moreover if a tender was to be properly made, and the landlord afterwards proceeded to a sale, even in that case, though the act directs that the distress shall cease, the tenant could not legally rescue the goods, but must have recourse to his action of trespass; for the illegality of a landlord's proceedings will not warrant the tenant's doing himself justice.

“*Sec 9.* Any person lawfully taking any distress for any kind of rent, may impound or otherwise secure the distress so made, of what
“ nature

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“ nature or kind soever it may be, in such place,
 “ or on such part of the premises chargeable
 “ with the rent, as shall be most fit and conven-
 “ nient for the impounding and securing such
 “ distress; and may appraise, sell and dispose of
 “ the same upon the premises, in like manner,
 “ and under the like directions and restraints, as
 “ any person taking a distress for rent may now
 “ do off the premises, by virtue of 2 *H. & M.*
 “ c. 5. or of 4 *G. 2. chap. 28.* And any per-
 “ son may come and go to and from such place
 “ or part of the said premises, where any dis-
 “ tress for rent shall be impounded and secured,
 “ as aforesaid, in order to view, appraise and
 “ buy, and also in order to carry off or remove
 “ the same, on account of the purchaser thereof;
 “ and that if any pound-breach or rescous shall
 “ be made of any goods and chattels, or stock
 “ distrained for rent, and impounded, or other-
 “ wise secured by virtue of this act, the person
 “ aggrieved thereby shall have the like remedy,
 “ as in cases of pound-breach, or rescous, is
 “ given and provided by the said statute. *f. 10.*”

When this act gave landlords a power of seiz-
 ing those things as a distress, which they had no
 previous authority to do, it very prudently pro-
 vided against any inconveniencies arising from a
 pound-breach or rescous of goods, as above de-
 clared by the act.

Though this act certainly meant to include
 every species of offence, which it had created a
 possibility of being committed, and to afford a
 mutual protection to landlord and tenant, by
 giving the like remedy to both, as is provided by
Stat. 2 H. & M. chap. 5. yet, from the inaccu-

racy

racy of it, hath most clearly exempted the landlord, or other person, who makes an unjust distress, from any penalty, so that if a person makes an illegal distress of such things as were not distrainable before 11 Geo. 2 chap. 19. he is only liable to a common action of trespass; whereas, if he illegally distrains, and sells any thing that might have been taken prior to or by virtue of Stat. 2 W. & M. chap. 5. he is liable to a penalty of double the value of the goods taken, and to pay full costs of suit.

“ Every attornment shall be void, and the possession of the landlord or lessor shall not be charged, altered or affected thereby. Provided, That nothing herein contained shall vacate or affect any attornment made pursuant to and in consequence of some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or lessor, or to any mortgagee, after the mortgage is become forfeited. *Sec. 11.*

“ Every tenant, to whom any declaration in ejectment shall be delivered, shall give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years improved or rack-rent of the premises so demised or holden in the possession of such tenant, to the person of whom he holds; to be recovered by action of debt, to be brought in any of his majesty's courts of record. *Sec. 12.*

By *Sec. 13.* “ It shall be lawful for the court where such ejectments shall be brought to suffer the landlords to make themselves defendants, by joining with the tenants to whom such declaration

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“ declaration shall be delivered, in case they appear; but in case such tenants neglect to appear, judgment shall be signed against the casual ejector; but if the landlord of any part of the tenements desire to appear by himself and enter into the rule, the Court shall permit such landlord so to do, and order stay of execution upon such judgment against the casual ejector, until they make further order therein.”

By joining with the tenants.] Motion that the landlords (naming them) might be made defendants, without the tenant in possession, who refused to appear, denied by the Court of Common Pleas. *Trinity Term, 6 & 7. Geo. 2, 1733. Balderidge and Paterfon. Barnes, 172.*

Motion that the landlord might be added defendant to C. D. one of his tenants, who did appear to defend for the tenements in his possession; and that as to the residue of the tenements in possession of T. M. another tenant, who refused to appear (as by affid.) the landlord might appear and defend singly, and a rule was made accordingly; and that plaintiff might sign judgment against the casual ejector, as to the tenements in possession of T. M. but that the writ of *habere facias possessionem* be stayed till further order. (a.) *Roe on demise of Gobard, against Doe.*

Landlord.] A mortgagee, who had never received the rents, or who had not got into possession, hath been refused to be admitted to defend as landlord, or to be made a defendant with

(a) *Barnes, 179.*

the tenant. *Trinity Term. 15 Geo. 2. 1742. B. R. Jones on the demise of Woodward v. Williams.* (1)

Application on behalf of J. S. and his wife, who (2) claimed title to part of the premises (of which part P. and H. were tenants, and refused to appear) upon affidavit of the fact for leave to appear for J. S. and his wife, as to the said part; rule made to shew cause; on shewing cause it appeared, that the lessors of the plaintiff said J. S. and wife claimed title as devisees, the lessors under one will, and J. S. and wife under another will of the same testator; and the question to be decided was, which will should prevail. The lessors of the plaintiff had got the start of J. S. and wife; and by bringing their ejectment first, (the tenant refusing to appear) would get into possession without defence, unless J. S. and wife were permitted to defend.

The court of *Common Pleas* said, That this motion was founded on the act of parliament of 11 Geo. 2. that the court had no jurisdiction to admit any person to defend in an ejectment, instead of the tenant, except the landlord (3) only; and who is landlord within the act? not every person claiming title; but who is in some degree of possession, as receiving rent, &c. the

(1) *Tri. at Ni. Pri. 96. 2 Stra. 1241.* by the name of *Jones v. Edwards*, which case, (though not so reported) must have been, where the mortgagee had not got into possession. *Barnes 194.*

(2) *Barnes 193.*

(3) *Tri. at Ni. Pri. 96. Barnes 193, 194.*

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clause (1) of forfeiture by tenant, if he does not give notice of declaration to his landlord, proves this. *Michaelmas Term 29 Geo. 2.* 17, 56. *C. B. Roe*, on the demise of *Leake* widow, and others, v. *Doe*.

To appear by himself] Before (2) this act, the rule of court, upon the tenant in possession his refusing or neglecting to appear, was, that the landlord might be made *defendant together with the tenant*, but not (3) *alone*, till this act, and the

(1) By Stat. 11 Geo. 2. c. 19. *sect. 12. P. 212.*

(2) See 7 Mod. 70, Salk. 256. pl. 6. 2 Stra. 830. *Barnard B. R.* 146, 150. Motion that tenant in possession might be struck out of the declaration, and landlord added defendant: Court of King's Bench said, that the landlord might be added but could not be struck out, that it would be of dangerous consequence, that it never was nor could be done. *Cas. Temp. Hardw.* 162. the court will, at the defendant's request, take in the landlord to be co-defendant, by *Page J.* *Cas. Temp. Hardw.* 164. but not without plaintiff's consent, by *Lee, J.* *Cas. Temp. Hardw.* 165. one of the present judges (3 *Black. Com.* 204) was of opinion, that the landlord had a right to demand to be made co-defendant long before the provision of this statute.

(3) 9 *Fin. Abr.* 330. but Sir J. *Strange* questions the soundness of this doctrine, as it then stood, observing, that it gave tenants much too great a power, and made them absolute masters of the estate, and enabled them to choose their own landlords: and therefore he applied to the legislature, and obtained, Statute 11 Geo. 2. c. 19. which act was drawn up and brought into parliament by Sir *John*, 3 *Bur. Rep.* 1792. in consequence of the case of *Codrigh v. Hart et Un.* in 2 *Stra.* 830. See 3 *Bur. Rep.* 1303.

case

case in 12 *Mod.* 211, cited to the contrary, was denied to be law by the court of *King's Bench*. *Michaelmas Term 12 Geo. 2. 1739. B. R. Sir William Clayton v. Boone.*

The court of *King's Bench*, in an ejectment for a chappel and certain lands in *Hampstead*, was moved, that the parson might be made a defendant only *quoad* his right of entry into the chappel to perform divine service; but the motion was refused, notwithstanding a like motion was granted by the said court, as appears by *Salkeld's* (6) *Reports*; judge *Pope* said, that in the case of the

(1) The case alluded to is in *Salk.* 256. *pl.* 7. and is thus stated: *K. James I.* by his letters patent granted the impropriation of *Aldgate* to *B.* and his heirs, reserving the right of patronage, &c. and a covenant on the grantee's part to pay the chaplain ten pounds *per annum*, there being no vicarage, endowed out of the impropriation. *K. Charles II.* made *Dr. Hollingsworth* chaplain or curate by grant under the great seal, under which he enjoyed it many years. *Brewster* the assignee of the patentee brought an ejectment, delivered a declaration to the defendant, and had judgment by default, and possession delivered him upon an *Hab. Fa. Pos.* And Mr. At. General *Trevor* moved, that the doctor, having no right to the possession, but only a power to enter in order to preach, which the defendant kept him out of by colour of this judgment in ejectment and execution, might be restored. If the doctor (said the court of *Common Pleas*) had a power to preach there, he should have come in and moved for a special rule to defend only *quoad* a special right of entry to perform divine service. See *Tri. at Ni. Pri.* 99.

dean

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dean and chapter of *Westminster*, he remembered that doctor *Broderick* applied for such a rule, in the court of *Exchequer*, and it was refused him; lord *Raymond* said too, that he had known such motions often denied since; accordingly it was so in the present case. *Michaelmas Term 5 Geo. 2. 1722. B. R. Martin v. Davis. (1)*

Motion for the landlord to defend upon this clause of the statute, the court of *Common Pleas* objected that this motion could not properly be made 'till after judgment signed against the casual ejector; and, that affidavit ought to be produced of the tenant's refusal or neglect to appear. *Wynne* answered, that immediately after judgment signed against the casual ejector, plaintiff might take possession. The court held the affidavit necessary, and therefore made no rule; but declared that the intent of signing judgment against the casual ejector, was only that the plaintiff, after having tried his cause against the landlord, (the tenant not being a party) might have the benefit of his verdict, and take possession under the judgment, which under such verdict he could not. It seems reasonable (upon a proper affidavit) to grant a rule to shew cause, before judgment against the casual ejector can be signed, to prevent the ill consequence of taking possession immediately after, (2) *Hobson*, on the demise of *Bigland* against *Dobson*.

(1) 2 *Str.* 914. 2 *Barnard. B. R.* 27 *Bu' Ni.* 179.

(2) *Barnes* 179.

The declaration was of *Hilary Term*, served with notice to appear in *Easter Term* last, and not moved till this term, when a rule was made for judgment, unless the tenant should appear within six days after notice. The landlord prayed for the conditional rule, and for leave to plead ancient demesne, upon an affidavit that the premises were ancient demesne; and obtained a rule to shew cause. *Per curiam*: the landlord, by this clause of the statute, is to enter into the common rule by consent; before the statute, he might have been added a defendant; and, if he had applied in time, must have had leave to plead ancient demesne. He is to be considered in all respects in the same case as the tenant in possession, but must apply according to the course and rules of the court. If the plaintiff should prevail on this plea to the jurisdiction of the court, the judgment must be, that defendant shall answer over. Therefore, if this plea be not confined to a time certain, great delay of justice must follow. The rule discharged as to pleading ancient demesne, because the application was not made in time, that is, within the first four days of this term. *Trinity Term* 19 & 20 Geo. 2. 1746. *C. B. Goodtitle* on the demise of *Symons* esq; against *Thrustout*, in ejectment, *Clarke* esq; landlord. *Barnes* 187.

Ejectment for three houses at *Depisford* in *Kent*; the case reserved at *Nisi Prius*, for the opinion of the court was thus stated, viz. That *Richard Mann*, 1741, demised the premises to *A. B.* for 500 years by way of mortgage, to whom the plaintiff's lessor is executor; the mortgage becomes forfeited, and this ejectment being brought,

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the defendant obtained a rule to defend as *landlord* in case the defendant did not appear; and at the trial it was insisted upon for the defendant, that the plaintiff ought to prove that the defendant or his *tenant* was in possession of the premises in question; and failing in *that*, Mr. just. *Burnett*, who tried the cause, was of opinion the plaintiff had failed in proving his case; but reserved it for the opinion of the court: and now upon debate it was held clearly *per curiam*, That it was necessary to prove the defendant or his *tenant* in possession of the premises, for the rule is, that the *landlord* shall defend for the premises only whereof his tenants are in possession, and the party does not admit himself to be *landlord* of any premises which the plaintiff makes title to, but in such only as were in possession of those *tenants*; the *possession* was ordered to be delivered to the defendant. *Trinity Term 21 & 22 Geo. 2. 1748. B. R. Smith, on the demise of Taylor v. Mann. Wilf. B. R. 220. Bul. Ni. Pri. 110. S. C. S. P.*

The tenants had the forenoon of the 29th of *April* this term to appear in; *Foster*, the landlord, moved to add himself to the tenants, but no appearance being entered, plaintiff on the 30th signed judgment against the casual ejector. The landlord afterwards, without disclosing to the court what had been previously done, applied for the conditional rule, as a matter of course, and by virtue thereof on the first of *May* appeared alone without the tenants. Plaintiff moved for leave to take out execution on the judgment; and, on shewing cause, the judgment appeared to

be regular, and the appearance out of time. Plaintiff offered to wave his judgment, if the landlord, who resided at *Jamaica*, would give security for costs; to which his counsel not consenting, the court of *Common Pleas* made the rule absolute, for leave to take out execution. *Easter Term 18 Geo. 2. 1745. Roe v. Doe*, on the demise of *Hyde*, in ejectment. *Barnes 186, 187.*

[*Stay of execution*] Where the act says, that in case judgment in ejectment be had against the tenant in possession on his refusing or neglecting to appear (no notice being given to the landlord) the landlord may move, that execution may be stayed on entering into a rule, to become defendant himself in another ejectment, &c. yet, in case judgment is signed so late in the term that the landlord cannot apply for a stay of execution, upon application by the landlord as soon as may be, the court will set aside the execution, upon this judgment, although the words are only (*stay execution*). *Michaelmas Term 12 Geo. 2. 1739. B. R. Sir William Clayton v. Boone 9 Vin. Abr. 329, 330.*

This was an ejectment, in which *Wisdom* (the landlord) had (upon the tenant's refusing to appear), and the plaintiff, having obtained judgment against *Wisdom* the landlord, had afterwards moved for leave to take out execution against the casual ejector: from doing which without leave, he stood restrained by the conditional rule "for a stay of execution against the casual ejector till further order," always made in consequence of a clause in the act of 11 *Geo. 1. c. 19. s. 13.* (which clause gives leave for making the landlord defendant in the room of the

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the non-appearing casual ejector, upon these terms.)

But a writ of error had in fact been regularly sued out by the new defendant *Wisdom*, the landlord, before the plaintiff had made this motion, "for leave to take out execution against the casual ejector", yet nothing of this matter of the writ of error was shewn for cause, by the new defendant *Wisdom* the landlord, against the plaintiff's said motion "for leave to take out execution against the casual ejector;" But that rule was made absolute, without any cause whatever being shewn against it.

Now the court, upon the whole state of this affair, were of opinion, that the day of shewing cause against that rule was the proper time for the landlord to have made his stand against the plaintiff's taking out execution and getting into possession; and that he should then have shewn his writ of error, as cause why the plaintiff ought not to have had leave to take out execution; and why it ought still to have been further stayed; but that, as he had omitted to do so, when he had this proper opportunity, the execution was regular, and consequently ought not now to be set aside. Rule discharged. *Hilary Term 32 Geo. 2. 1759. B. R. George, ex dimiss. Bradley, et al. v. Wisdom. 2 Bur. Rep. 756.*

Note. It was agreed on all hands, that a writ of error could not have been taken out in the name of the casual ejector.

Until they make further order therein] In this case the landlord appeared without the tenant, and after a verdict for the plaintiff, he brought a writ

of error, upon which the plaintiff moved to take out execution, which the court refused to grant, for tho' it is left to their discretion, yet that can only be a legal one, the statute 11 G. 2. c. 19. intended to put the landlord in the place of the tenant, that he should not be stripped by any act of the tenant, and it ought to be considered as if the tenant had brought error, which would undoubtedly be a *superfedeas*, the court of *King's Bench* cannot take upon them to judge, whether there is error in the proceeding or not. 2 *Stra.* 1241, 1242.

A landlord was made defendant, according to this clause of the statute, on the tenant's non-appearance, and entered into the common rule; and thereupon a stay of execution against the casual ejector was ordered until the court should make further order. A writ of error brought by the landlord, is a sufficient reason against taking out execution; but the proper opportunity for the landlord to make his stand against the execution, is by shewing this as cause against the plaintiff's motion for leave to take it out; if he omits this opportunity, the execution (regularly issued) shall not be set aside. By lord *Mansfield*. 2 *Bur. Rep.* 757.

" The landlord, where the agreement is not
 " by deed, may recover a reasonable satisfaction
 " for the lands, tenements, or hereditaments, held
 " or occupied by the defendant in an action on
 " the case, for the use and occupation of what
 " was so held or enjoyed; and if in evidence on
 " the trial of such action any parol demise, or
 " any agreement (not being by deed) whereon a
 " certain

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“ certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered. *Stat. 14.* ”

“ The preamble recites that where a lessor or landlord had only an estate for life in the lands or hereditaments demised, and happened to die before or on the day on which any rent was reserved, or made payable, such rent, or any part thereof, was not by law recoverable by the executors or administrators of such lessor or landlord; nor was the person in reversion intitled thereto, any otherwise than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life, of which advantage had been often taken by the under-tenants, who thereby avoided paying any thing for the same; the statute therefore enacts, ”

“ By *Stat. 15.* Where any tenant for life shall die before or on the day on which any rent was reserved upon any demise which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action upon the case, recover of the under-tenants, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion, of such rent, according to the time such tenant for life lived of the last year or quarter, or other time, in which the said rent was growing due, making all just allowances. ”

“ Tenant in tail, remainder to the defendant in fee, leases for years, and dies without issue a week before

before the day of payment of the half year's rent. The lessee, at the day, pays all the half year's rent to the defendant. The executor of the tenant in tail brings his bill for apportionment of the rent. By the Lord Chancellor *Hardwicke*, this point has never been determined; but this is so strong a case, that I shall make it a precedent. There are in it two grounds for relief in equity. The first arises on the statute of the 1. Geo. 2. The second arises on the tenants having submitted to pay the rent to the defendant. The relief arising upon the statute, is either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinable estate, died but a day before the rent reserved on a lease of his became due, the rent was lost. For no one was intitled to recover it. His representatives could not; because they could only bring an action for the use and occupation; and that would not lie where there was a lease, but debt or covenant. Nor could the remainder man; because it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy. But there are two descriptions of the person, to whose executors the remedy is given. In the preamble, it is one having only an estate for life. In the enacting part, it is, tenant for life. Now tenant in tail comes expressly within the mischief. I do not know how the judges at common law would construe it: but I should be inclined in this court to extend it to them. I should

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should make no doubt, were this the case of tenant in tail after possibility of issue extinct; for he is considered in many respects as tenant for life only. He cannot suffer a recovery. He may be enjoined from committing waste, such as hurts the inheritance, as felling timber; though not for committing common waste, being considered as to that as tenant in tail, were it the case of tenant for years determinable on lives, he certainly must be included within the act, tho' it says only tenant for life: It would be playing with the words to say otherwise. These cases shew the necessity of construing this act beyond the words. Tenant in tail has certainly a larger estate than a mere tenant for life; for he has the inheritance in him, and may when he pleases turn it into a fee; but if he does not, at the instant of his death he has but an interest for life. Such too is the case of a wife tenant in tail *ex praesent marito*: upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this, *equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to the reasons of acts of parliament? Nay, it has actually done so, on the statute of forcible entry; upon which, this court grounds bills, not only to remove the force, but to quiet the possession. That act requires an estate in possession. This court extends the reason to equitable interest. But I ground my opinion in this case, upon the tenants having submitted to pay the rent. He has held himself bound in conscience to pay it, for the use and occupation of the land the last half year.

He paid it to the defendant, which he was not bound to do in law. And in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity intitled to it. The division must be that prescribed by the statute; and then the plaintiff is intitled to such a proportion of the rent as accrued during the testator's life. And accordingly it was decreed. *Dec. 4, 1753. Chanc. Pagett & Geo. Burn's juf. 448.*

"The preamble reciting that landlords were often great sufferers by tenants running away in arrear, and not only suffering the demised premises to be uncultivated without any distress thereon, whereby the landlords or lessors might be satisfied for the rent in arrear, but also refusing to deliver up the possession of the demised premises, whereby landlords are put to the expence and delay of recovering in ejectment, the statute enacts,"

"By *Stat. 16.* If any tenant holding tenements at a rack rent, or where the rent reserved shall be full three-fourths of the yearly value of the premises, who shall be in arrear for one year's rent, shall desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears; it shall be lawful for two justices of peace (having no interest in the premises) at the request of the landlord, his bailiff or receiver, to go upon and view the same, and to affix on the most notorious part notice in writing, what day (at the distance of fourteen days at least) they will return to take a second view; and if upon such second view the tenant, or some person on his behalf, shall not appear and pay the rent in arrear, or there shall

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not be sufficient distress upon the premises, the justices may put the landlord into possession, and the lease to such tenant, as to any demise therein contained only, shall become void."

And the justices in this, and all other the like cases, ought to make a record of the whole proceedings, to be produced afterwards in case of an action brought against the landlord by such tenant. For the justices are not to carry witnesses, with them about the country, to testify what they shall act as judges of record; nor doth it seem requisite, that they should go and testify in a court upon their oaths, what they shall have acted in such cases; but to make a record in writing, under their hands and seals, of all that hath been done: which record, being produced in court, seemeth to be the proper evidence in all such cases, for that the law reposeth an entire confidence therein, and it shall not be gainsaid; otherwise there would be no end of things.
Burn's Jus. 447.

The court granted a *Mandamus* to two justices to proceed and give judgment in a certain complaint depending before them on the statute 11 Geo. 2. c. 19. s. 16. for the relief of landlords, upon the return of the *Mandamus* the justices said therein that they had heard and determined the complaint that was before them, and that return was allowed. *Trinity Term 16 & 17 Geo. 2. 1743. B. R. the King v. Richardson & Lacy. Wilf. Rep. 21.*

Notice to put landlord into possession, and to make void his lease, where the tenant holds at rack rent; or where the rent is three quarters of the yearly value of the premises, and owes for one year, and deserts the premises uncultivated, so as no sufficient distress can be had; pursuant to *Stat. 11 Geo. 2. Chap. 19. Sect. 16.*

Richard Jackson,

TAKE notice, that upon the complaint of John Rayner of May-fair in the parish of Saint George, within the city and liberty of Westminster, and county of Middlesex, Gentleman, made unto us John Fielding Knight, and James Addington Esq; two of his Majesty's justices of the peace for the said county, in pursuance of an act of parliament made in the eleventh year of the reign of his late Majesty king George the second, entitled, "An act for the more effectual securing the payment of rents, and preventing frauds by tenants," that you the said Richard Jackson, have deserted the messuage or tenement called
 consisting of situate, lying,
 and being, at May-fair aforesaid, in the parish and
 county aforesaid, unto you demised at rack rent by him
 the said John Rayner; and that there is in arrear
 from you the said R. J. unto him the said J. R. the
 sum of the same being one whole year's rent,
 due

due on ^{the} said ^{premises} last, for the said demised premises, and that you have left the said premises uncultivated and unenclosed, so that no sufficient distress can be had, to countervail the said arrears of rent; we the said justices (having no interest, nor either of us having any interest, in the said demised premises) on the said complaint as aforesaid, and at the request of him the said J. R. have this day come upon and viewed the said demised premises, and do find the said complaint to be true; and on the 28th day of this present month of September we will return to take a second view thereof; and if, upon such second view, you, or some person on your behalf, shall not appear and pay the said rent in arrear, or there shall not be sufficient distress on the said premises, then we the said justices will put him the said J. R. into the possession of the said demised premises, and the lease thereof will from thenceforth become void, according to the form of the statute in such case made and provided: In witness whereof we have hereunto set our hands and seals, and have caused this notice to be affixed on the out door of the mansionhouse, the same being the most notorious part of the said premises, this 2th day of September, in the seventeenth year of the reign of our sovereign lord George the third, of Great Britain, France, and Ireland, King, &c. and in the year of our Lord 1777.

[illegible]

“Such proceedings of the said justices shall
 “be examinable in a summary way by the next
 “justice or justices of assize of the respective
 “counties, in which such lands or premises
 “lie; and if they lie in the city of London or
 “county of *Middlesex*, by the judges of the
 “court of *King’s Bench* or *Common Pleas*; and if
 “in the counties palatine of *Chester*, *Lancaster*,
 “or *Durham*, then before the judges thereof;
 “and if in *Wales*, then before the courts of
 “grand sessions respectively, who are hereby re-
 “spectively empowered to order restitution to
 “be made to such tenant, together with his ex-
 “pences and costs, to be paid by the lessor or
 “landlord, if they shall see cause for the same;
 “and, in case they shall affirm the act of the
 “said justices, to award costs, not exceeding
 “five pounds, for the frivolous appeal.” *Sec.*

17.

“The preamble reciting that great inconveni-
 “encies had happened, and might happen to land-
 “lords whose tenants had power to determine their
 “leases, by giving notice to quit the premises by
 “them holden, and yet refusing to deliver up the
 “possession, when the landlord had agreed with an-
 “other tenant for the same; the statute enacts,”

“By *Sec.* 18. In case any tenant shall give no-
 “tice of his intention to quit the premises, and
 “shall not accordingly deliver up the possession at
 “the time in such notice contained, the said tenant,
 “his executors or administrators, shall pay to the
 “landlord double the rent which he should other-
 “wise have paid.”

This

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This clause proceedeth upon a supposition, which perhaps may not be true, namely, that the tenant is a man of substance. It is more likely, that, if he were able to live elsewhere, he would not chuse to hold over under such circumstances, nor perhaps would the landlord want to be rid of him. The putting him out of possession, by some expeditious and easy method, seemeth the more adequate remedy in this case, in like manner as is provided in the case where the tenant deserteth the premises, *Burn's Jus.* 446.

An ejectment may be brought against a tenant, to whom the landlord hath given notice to quit at such a time, and does not quit accordingly, as well as when the tenant gives the landlord notice, that he shall quit at such a time.

Tenant is liable to pay double rent, for not quitting after having given *parol* notice only to do so; and though he held under a *parol* demise: 3 *Bur. Rep.* 1607, 1608, 1609.

“Where any distress shall be made for any
“kind of rent justly due, and any irregularity
“or unlawful act shall be afterwards done by
“the party distraining, or by his agents, the distress itself shall not be therefore deemed to be
“unlawful, nor the party making it be deemed
“a trespasser *ab initio*; but the party aggrieved
“by such unlawful act or irregularity, may recover full satisfaction for the special damage
“he shall have sustained thereby, and no more,
“in an action of trespass, or on the case, at the
“election of the plaintiff: Provided, That
“where the plaintiff shall recover in such action,
“he shall be paid his full costs of suit, and have
“all

" all the like remedies for the same, as in other
" cases of costs. *See* 19.

“ No tenant or lessee shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party distraining, or his agent, before such action brought. Sect. 20.

This act of parliament put an end to many trifling, frivolous suits, which, though strictly legal, were very unconscionable, by giving a landlord an opportunity of making his tenant a reparation, equivalent to the injury he had done him, by an irregularity incautiously committed, by declaring that such irregularity should not operate so as to render the distress illegal, and the party making it a trespasser *ab initio*, but that the persons aggrieved thereby should recover full satisfaction for the special damage in an action of trespass or on the case; and further directs, that no tenant or lessor shall recover in any action for such irregularity, if tender of amends has been made by the party distraining before action brought; this put the matter upon a just footing, for nothing could be more absurd, than because a landlord had been guilty of immaterial irregularity, in taking a distress for rent (1) *really due*,

"...a much better way of proceeding, may be... that..."

(3) However let me observe, that this act only extends to such cases, where the rent was really due, for if a landlord should be so imprudent, as to make a distress, on the very day the rent is made payable, (which is very frequently done) this act will be of no service to him, for as the tenant hath a right by law to

pay

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that therefore the whole proceedings should be set aside, and he deemed a trespasser *ab initio*, and as such be liable to answer in damages the whole amount of the rent distrained. That the tenant, if injured by any irregularity, in the distress, should be redressed, was perfectly right and proper; but that the irregularity, whether trifling or material, should overturn all that the landlord had done, was as absurd, as it was cruel; the tenant could but be redressed, and to supersede all the proceedings of the landlord for an insignificant error in the distraining, was rendering the law rather a vindictive instrument of oppression than a remedial means of justice; and therefore the legislature very wisely interposed, and gave the tenant an opportunity of recovering a satisfaction for the injury he had received, without doing an injustice to the landlord by making the distress illegal, and the party making it a trespasser *ab initio*.

"The preamble recites that great difficulties often arose in making avowries or conuzaues upon distresses for rent, quit rents, reliefs, heriots, and other services, the statute enacts,

ply his rent on any part of that day whereon it becomes due, if the landlord distrains before the whole day is expired he will be a trespasser *ab initio*, but if the rent, for which the distress is made, is due at the time of making it, in case the distress continues longer unsold or the premises, than the five days, allowed him by Stat. 21st Geo. 3. c. 19. he would have been deemed a trespasser *ab initio*.

By

"By Sect. 22. It shall be lawful for all defendants in replevin to avow or make conuzance generally, that the plaintiff in replevin, or other tenant of the lands whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; or that the place, where the distress was taken, was parcel of such certain tenements held of such honour, lordship, or manor, for which tenements the rent, relief, heriot, or other service, distrained for, was at the time of such distress, and still remains due; without further setting forth the grant, tenure, demise, or title of such lessors, or owners of such manors; and if the plaintiff in such action shall become nonsuit, &c. the defendant shall recover double costs."

Nil habui in tenementis, is not a good plea in bar to an avowry, under this clause of the statute, by the unanimous opinion of the whole court of Common Pleas. *Hill. Term, 4 Geo. 3. 1764. C. B. Sullivan v. Stradling. Will. Rep. C. B. 208, 211.*

Trespass for breaking his close with cattle, &c. As to all the trespass except with one hog, Not guilty; and in bar to that. That the plaintiff distrained the hog *damage-feasant*, and impounded it in the common pound of the manor, *nomine districtionis*, &c. Replication confessed the distress and impounding, and that the hog without the assent of the plaintiff escaped out of the pound, the plaintiff *adunc nec adhuc* not being satisfied for the said damage. To this defendant demurred. Judgement for defendant by three judges

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judges against one, because it did not appear that the hog escaped by default of the defendant, for perhaps it escaped by a fault in the pound; and it would be very hard that the defendant should lose his pig, and also make other satisfaction to the plaintiff for the damage done by it. *Vide* the arguments there that distress is only in nature of a pledge, and upon tender of full satisfaction, though after *Withernam* or return irreplevisable, must be restored, or else detain lies for it. Lord Raym. 719, 720. 11 Mod. 21. 12 Mod. 660. *Vasser v. Eddowes*.

A distress for rent cannot be made in the night, otherwise for *damage-feasant*, lest the beasts should escape before they are taken.

Covenant for non-payment of a year's rent from *Michaelmas* 1725 to *Michaelmas* 1726. The defendant craved *oyer* of the lease, in which there is a covenant on the part of the lessee to repair, except the premises shall be demolished by fire: and then pleads, that before *Michaelmas* 1725, the premises were burnt down against his will, and that they were not rebuilt by the plaintiff during the whole year for which the rent is demanded; nor had he any enjoyment of the premises; and therefore prays judgment if he shall be charged with the rent. To this plaintiff demurred; and it was insisted on, that whatever might be the default of the plaintiff in not repairing, yet the defendant must in all events perform his covenant to pay his rent; and *Aleyn* 27, was cited, and the court said that the case in *Aleyn* 27, was express. If the defendant has any injury he will have his remedy; but he cannot set it off against the demand for rent. The
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plaintiff must have judgment. E. 13 Geo. 1.

Monk v. Cooper, Str. 763. 2 Lord Raym. 1477.

3 Bur. Rep. 1638. S. P.

In trespass for taking goods the defendant justifies, that he demised some tenements to the plaintiff for one term, and others for another term, and there being rent arrear on both demises, he distrained the goods. And on demurrer it was held ill, for these being separate demises, there ought to have been separate distresses on the several premises subject to the distinct rents; and no distress on one part can be good for both rents. The plaintiff had judgement. E. 9 Geo. 2. *Regers v. Bluntire*, 2 Str. 1040.

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CHAP. V.

Of *Rescous*, in what Cases it may be lawful: Of *Replevins*, how they may be sued out; and of *Advowties* to *Declarations* upon *Replevins*.

THE word or term *rescous* is derived from an old Norman verb *rescouver*, which is in the Latin *recuperare*, that is, to take from, to get again, or recover: So that *rescue* is as much as to say, to recover or get again what another hath taken away. *Co. Lit.* 166.

And in the sense of the law, *rescous* is taking away or setting at liberty goods distrained, or the body of a person arrested, and in an officer's custody by virtue of legal process.

Such kinds of *rescous* as appertain unto our present subject, are of distresses taken; and we are therein to consider in what cases it may be justifiable to *rescue* goods or cattle distrained, and where not.

If a landlord distrain when there is no rent due, the tenant may make a *rescue*, and hinder that distress. *Co. Lit.* 4. 11.

In like manner, if a landlord come to distrain, and the tenant tender his rent unto him, and the lord will distrain notwithstanding; in this case the tenant may make *rescous*. *1 Inst.* 160.

If

If rent be in-arrear, and the lord distrain the tenant's cattle in the highway within his fee; here also the tenant may *rescue* them, for no man may distrain in the highway but the king, and his officers by special authority. *Coke, Ibid. Magna Charta, f. 25.*

In like manner, if a landlord distrain *averia carucae*, [goods of the plough,] where there is a sufficient distress to be taken besides; or if the lord distrain any thing that is not distrainable by common law or statute; in this case it is lawful for the tenant to make *rescue*. *Ibid. f. 112. Rastal, Tit. Distress 10.*

But if a lord come to distrain cattle which he sees within his fee, and the tenant or any others, to prevent the distress, drive the cattle away out of the fee, the lord may follow them with fresh suit, and distrain the cattle; and the tenant cannot justify a *rescous* of them, because in the judgment of the law the distress is taken within his fee. *Hugh's Grand Abridgment, 1 Part, p. 217. C. 21.*

But if the lord be coming to distrain, and have not sight of the cattle within his fee, though the tenant drive them off on purpose, or if the cattle after the view go out of the fee of their own accord, or if the tenant after the view removeth them for any other cause than to prevent the distress; then if the lord distrain them out of his fee, the tenant may justify a *rescue*. *Co. Lit. 161.*

If the lord distrain out of his fee in lands not holden of him, the tenant may make *rescous*, unless in the cases aforesaid. *Co. Lit. 161. a.*

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If *rescous* be returned without shewing the place where *rescous* was made, it is void. *Mod. Rep.* 112. *ph* 562.

If a man come to distrain cattle *damage-feasant*, and see the beasts in his ground, and the owner of the cattle drives them out before the distress taken; the owner of the ground cannot follow and take them, for if he do, the owner of the cattle may rescue them, for they must be *damage-feasant*; that is, doing hurt at the time of the distress taken, and the owner of the ground may bring his action of trespass. *Co. Lit.* 161. *a*.

The lord cannot break open any gate that is locked, nor break open any inclosure to take a distress. So that if a tenant lock up his gates, and inclose his ground, so that the lord cannot come to distrain, if the rent be behind, and the lord have had actual possession, this is a disseisin. *Coke, Ibid.* But see *Stat. 4 Geo. 2. c. 28.* 11 *Geo. 2. c. 19.*

Of Replevins.

A (1) replevin (*replegiare* is compounded of *re* and *plegiare*, viz. to re-deliver upon pledges or sureties) is grounded and granted upon a distress, and is a re-deliverance of it, that the thing distrained may remain with the first possessor, upon security given by him, to try the right with the detainer, and to answer in a course of law.

(1) A replevin is not an action or plaint within *Stat. 8 & 9 W. 3. chap. 2. § 3 Bar. Rep.* 1286, 1287.

Goods

Goods may be replevied two manner of ways, viz. By writ, which is by common law; or by plaint in the sheriff's court, which is by the statute. And the sheriff ought to take two sorts of pledges; one by the common law, viz. *Plegii de prosequendo*; and another by the statute, viz. *Plegii de retorno habendo*. And the party desiring of it, and giving such security as is by law required, shall upon any distress made for rent, or otherwise, have his replevin. See *Co. Lit.* 145. b. 101. and 102.

For the ease and speedy remedy of the country, in case of distresses where the cattle be pounded, the statute hath provided, That every sheriff at his own county day, or within two months after he first receives his patent, is to depute and proclaim in his shire town four deputies to make replevins within his county, which must reside within twelve miles one of another; on pain of five pounds a month for every month they are wanting.

So that when any man's goods are distrained or impounded, he may repair to one of these sheriff's deputies for that purpose; and there he may have a replevin (upon *Plegii de retorno habendo* &c.) to cause the goods distrained to be delivered to the owner.

By the writ *de replegiariis facias* which is at the common law, the sheriff is commanded, taking the pledges of prosecution, to re-deliver the goods distrained to the owner: But since the other, viz. by plaint in the sheriff's court, is the readier and easier way, this writ is out of fashion.

In

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In a replevin, he whose goods are distrained or impounded becomes the plaintiff, and declares against the other for unjustly taking and detaining his goods or cattle *contra vad' & pledg'*, &c.

If a landlord distrain, and carry the distress to hold, or out of the county, so that the sheriff upon a replevin cannot re-deliver the goods, then, upon the sheriff's return of the replevin, tenants may have a writ of *wilbernham* directed to the sheriff, to take as many of the lord's beasts, or as much goods in his keeping, till he have made deliverance of the first distress; and if the goods or cattle be conveyed to a fort or castle, the sheriff may command the power of the county, and beat it down. *Rassal, Tit. Distress 7.*

If a distress be made in a franchise or bailiwick, the sheriff is to direct his replevin to the bailiff thereof to deliver them upon pledges, &c.

And if he make no answer, or return that he will make no deliverance, or the like, then the sheriff may enter into the liberty and make deliverance; and if the distress was taken without the liberty, and impounded within the liberty, then the sheriff may enter and make deliverance, and need not first to make out a warrant to the bailiff of the liberty. *Stat. Marlbr. c. 21. Westm. 1. c. 17. 2 Co. Inst. 140, 194.*

The plaintiff in the replevin ought to have the property of the goods in him at the time of the distress made; for if the defendant claim property, the sheriff cannot replevy the distress, but the property must be tried by writ *de proprietate probanda*.

So that if the defendant claim property in the goods distrained, then must the plaintiff in the
M replevin

replevin have a writ *de proprietate probanda*, directed to the sheriff to try the property; and if the jury find for the plaintiff, then the defendant must make deliverance of the distress: And if it pass for the defendant, the sheriff can proceed no further unless the plaintiff bring a writ of *replegiari facias* directed to the sheriff, and then though he do return the property, yet it shall proceed to trial in the Common Pleas upon the issue of the property. *Co. Lit.* 145.

And it is noted, That there are two kinds of property; that is, a general property, which every absolute owner hath; and a special property, as of goods pledged or taken to manure one's land, and the like; and of both these a replevin doth lie. *Co. Lit.* 145. *b.*

But a man cannot claim property by his bailiff or servant.

The defendant in a replevin, that is, he that made the distress, may, if he see cause, bring a writ of *recordare*, and so remove the plaint upon the replevin out of the sheriff's county court into the Common Pleas; and if the plaintiff declare not, he may have a *return' habend'*. And then if he declare not, a writ to enquire of damages. *2 Co. Inst.* 339.

And if a replevin be depending by writ out of chancery, the plaintiff or defendant may remove the plea by a *pone*; and if the plea be depending in the county, the plaintiff may remove the same without cause; but the defendant cannot move the same without cause, which must be inserted in the end of the writ. *2 Co. Inst.* 339. *Reg. Orig.* 84. *F. N. B.* 69.

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If a man by his deed grant a rent with a clause of distress, and grant further that he shall keep the goods distrained against sureties and pledges till the rent be paid; this grant is not good, but the sheriff may replevy the goods distrained notwithstanding: For if such a distress should be irrepleviable, the current of replevins would be stopped, to the great damage of the subject.

If the goods or cattle of several men be distrained, they cannot join in a replevin, but every man must have a several replevin; for in a replevin it is a good plea to say, the property is to the plaintiff and to a stranger; and where there be two plaintiffs, that the property is to one of them. *Co. Lit.* 145.

If a man take a distress in one county, and drive it into another, the owner of the cattle may sue a replevin in which county he pleaseth. *Comp. Att.* 131.

In a replevin, if it be of two cattle, one living, the other dead, the living shall be first demanded. *Finch. l. 1. c. 3. p. 25.*

If the cattle of a *feme sole* be taken and afterwards she taketh a husband, he alone may sue a replevin. *Ibid.*

If the plaintiff in replevin do not set out the place where the distress is taken as well as the town, his declaration will be nought, and the avowment may overthrow him upon a demurrer. *Hob. Rep.* 16. *int' Read and Hawkes.*

If a lord distrain his tenant wrongfully, altho' the cattle be come back again to the owner, yet the tenant may have a replevin against the lord, because he cannot have an action of trespass against him.

The plaintiff in a replevin ought to be careful in giving his instructions for it, for it must be certain in setting down the number and kinds of the cattle which are distrained, otherwise the replevin is not good.

The *avowant* is the defendant in a replevin; that is, he that made the distress; and when he justifies in his plea for what cause he distrained, that plea is called his *avowry*.

As if a landlord distrains for rent in arrear, and the tenant or owner of the cattle brings a replevin, and declares against him for unjustly taking and detaining his cattle, and the defendant justifies he took it in his own right, and so shewing the cause of his taking in his plea; this is an *avowry*.

But if the defendant took the distress for or in the right of another, then, when he hath shewed the cause in his plea, he must make the *confessio* or acknowledgment of the taking the distress, as being bailiff or servant unto him in whose right he took it.

The court granted an attachment against the under-sheriff of *Cumberland*, for granting a replevin of goods distrained on a conviction for deer-stealing. *E. 16 Geo. 2. Dominus Rex v. Monkhouse*, in *B. R. Str.* 1184.

Replevin in *London*, defendant appears upon an *elongata*, plaintiff declares for taking guns in *quodam loco vocat' the Minories in London*; defendant pleaded *Non capit modo et forma*. At the trial the plaintiff proved the taking at *Rotherhithe in Surry*; upon which it was objected, that the plaintiff had not proved his issue, for the place is material, and therefore part of the issue under
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modo et forma. The counsel for the plaintiff admitted that it was traversable, but insisted that by not traversing it particularly, the place was admitted, and could not be insisted on upon *non cepit*. But chief justice *Pratt* held, that where the plaintiff avows at a different place, in order to have a return, he must traverse the place in the count, because his avowry is inconsistent with it: but where he does not insist upon a return, he may plead *non cepit*, and prove the taking to be at another place, for it is material. Whereupon plaintiff was nonsuit. *Hil. 8 Geo. 1. Johnson v. Wollger, at Guildhall coram Pratt, C. J. Str. 507.*

There are four manners of avowries which a lord may make upon a replevin:

1. Avowry upon his very tenant. *Co. Lit. 9. f. 135, 136.*
2. Upon his very tenant by the manor where the tenant had but a particular estate.
3. Upon his tenant by the manor where the lord had but a particular estate; and these three are avowries at the common law.
4. The lord may avow upon the matter in the land as within his fee: This is provided by *Stat. 21 H. 8. c. 19.* and is the safest way for the benefit of the lord; for by this statute the lord may avow the taking a distress, as in lands holden of him within his fee, without naming of any person in certain; which by the common law they could not do, but were thereby compelled to avow upon a person in certain, which often proved much to their damage and prejudice: For by the secret fines, recoveries, grants and conveyances,

which the tenants used purposely to frame to defraud the lords, they were ignorant upon whom to make their legal avowry; which inconveniences the forementioned statute hath prevented.

Now in an avowry upon this statute, the plaintiff in the replevin, be he tenant for years or otherwise, may have every sufficient answer and aid, and every other advantage in the law to the avowry, disclaims only excepted; for because the avowry is made upon no certain person, he cannot disclaim.

And if such plaintiffs be nonsuit or barred, or overthrown by the avowry, then the defendant or avowant shall recover costs and damages against the plaintiff, as the plaintiff should have done, if he had recovered in the replevin against the avowant.

If any avowry is made for rent, and it appears by the party's own shewing that part of it is not yet due, yet the avowry may be good for the residue. *1 Saund. 385.*

But if it appears, that an avowant has title only to two parts of the rent, for which he avows, the whole avowry shall abate. *Idem 286.*

Also in an avowry for rent, and *nomine parne* together, without alledging any demand of rent, the avowry is good for the rent, although it is ill for the penalty. *Ibid.*

Avowry for rent due at a later day, is not a bar in avowry for rent due at a former day; neither is a recovery in debt for rent due at a later day, a bar in debt for rent due at a former day, as an acquittance is. *1 Lev. 43.*

In replevin the defendant pleaded they were the beasts of a stranger, whereupon the plaintiff demurred,

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demurred, because it was only a plea in abatement. The court said, It was good either in bar or abatement, and that there needed no avowry for a return, because the beasts being not the plaintiff's, the avowant is to have the return; and the judgment was given for the defendant. 2 Lev. 92. See before, Stat. 17 Car. 2. at the end of Chap. IV.

If a tenant hath rent behind for divers years, and makes a feoffment in fee, and the lord accept the rent or service of the feoffee due in his time, he shall lose the arrearages of his rent due in the time of the feoffor: For after such acceptance, the lord cannot avow upon the feoffor, nor upon the feoffee, for the arrearages due in the time of the feoffor; but if the feoffor dieth, although the lord accept the rent or service by the hands of the feoffee due in his time, yet he shall not lose the arrearages, because he is now by the law compelled to avow upon the feoffee; and what the law enjoins him to, shall not be prejudicial unto him.

If the plaintiff in a replevin be nonsuit, or otherwise by avowry barred or overthrown; then the defendant or avowant shall recover costs and damages against the plaintiff, as the plaintiff should have done or had, if he had recovered in the replevin against the avowant. See before, C. IV.

Defendant in replevin may plead *property* in a stranger either in bar or abatement. And where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry; but where the plea in abatement is to the point of the action as *property* is, the defendant shall have a return without avowry: For

whether the property be in the defendant or a stranger, the defendant ought to have a return, because he had the possession which was illegally taken from him by the replevin, when the plaintiff had no right. *Hil. 4 W. & M. Butcher v. Porter, in B. R. Salk. 94. Lord Raym. 217.*

Error of a judgment in *C. B.* in replevin, for cattle taken the 26 *Sept.* The defendant avowed the taking as a distress for rent reserved on a lease for years, which was made under the title of *Christopher* late duke of *Albemarle*, and for the rent of two years and an half, ending at *Michaelmas* 29 *Sept.* &c. he avowed. And this was now assigned for error; for the distress was made before *Michaelmas*, when the rent was in arrear; and notwithstanding that, it was urged by *Montague*, That the distress was well made for the rent of two years; yet the court without difficulty reversed the judgment; for the avowry is for one entire rent, and the judgment accordingly; but before judgment, the avowant might have abated his own avowry for the half-year, and payed judgment for the residue, and this would have been good. Judgment reversed *nisi causa*. But afterwards the record was amended in *C. B.* *Mich. 9 W. 3. Richards and Cornesford, in B. R. Comyn's Rep. 42. pl. 26. Lord Raym. 255.*

Plaintiff in replevin declares for taking of his cattle in a certain place called *B.* The defendant pleads in abatement, That he took them in a certain place called *C.* *Abque hac, quod cepit in prad' loco vocat' B. prout, &c.* and *pro returna habendo* he avows, &c. The plaintiff confessed the caption to be in *C.* and thereupon the avowant had judgment, that the writ should abate, and for the return

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Return of the cattle. On a motion that the avowant might have his costs, it was resolved by the court, that he should not; for the statute of 21 H. 8. c. 19. does not extend to this case, but gives costs only when the plaintiff is nonsuited; and the Stat. 7 H. 8. c. 4. gives costs only when the plaintiff is barred; but here the plaintiff is neither barred nor nonsuited, but the writ only abates; and he may have a new writ, and is not put to his second deliverance. T. 1 *Ana. Smith* and *Walgrave*, in *B. R. in Replevin*, *Com. Rep.* 122. pl. 85. 2 *Lord Raym.*

Sheriff may justify by grant of a replevin, without shewing the property of the goods to be in the plaintiff: Trespass for taking two bullocks, &c. of the plaintiff. The defendant Davies, as to all but the taking the said bullocks, pleads Not guilty; and as to the taking them he justifies, for that before the taking the other defendant Evan Watts came before him, then Sheriff of Com. Radnor, and made his complaint against the plaintiff in a plea of taking and unjustly detaining the cattle, and found pledges to prosecute the said plaintiff, and to return the cattle, if a return should be adjudged, and prayed a warrant to replevy the same. Whereupon he made his precept to the other defendant S. Pries his special bailiff to replevy the same; and the plaintiff should appear at the next county court to answer the said Evan Watts in the said plea; which said precept, before the return and before the taking, he delivered to the said S. Pries, who by virtue of it, at the time and place, took the cattle, and the plaintiff not claiming property delivered them to the defendant, and summoned the plaintiff to ap-

pear at the next county court, to answer *Watts* in the said plea, for taking and distraining his cattle, and then returned his precept executed as aforesaid, he being sheriff at taking and return of precept, which is the same taking, &c.

The defendant *Evan Watts* pleads not guilty generally.

Defendant *Selby Price*, as to all but taking, pleads Not guilty, and as to that justifies by virtue of the precept *supra*.

The plaintiff demurs to both pleas, and shews for cause; that the defendants do not alledge that the cattle were the *proper cattle of the said Evan Watts*, or that he claimed property or title to them, or that they were in his possession, or shewn by him to the sheriff or bailiff, or were distrained by the plaintiff out of his possession.

2dly, That the plea doth not mention what pledges by name were found.

3dly, That it is not alledged plaintiff had notice of the plaint or replevin.

4thly, That the plea amounts to the general issue.

The defendants join in demurrer. *Cur'* held the plea good, and gave judgment for the defendants. *M. 11 Geo. 2. Miles v. Davies, Evan Watts and Selby Price, alias Rees, in Scacc. Com. Rep. 590. pl. 258.*

For the learning of avouries, see *D'Anvers's General Abridgment, Tit. Avowry, fol. 644, 645, &c.*

When the defendant in replevin makes connu-
sance, and avows, that the property is in himself,
it seems to be sufficient without a traverse. *Com. Rep. 247. pl. 137.*

Stat. 11.

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Stat. 11 Geo. 2. chap. 19. sect. 22. "All defendants in replevin may avow or make confession generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then, and still remains due; or that the place where the distress was taken, was parcel of such certain tenements, held of such honor, lordship or manor, for which tenements the rent, relief, heriot, or other service distrained for, was at the time of such distress, and still remains due, without further setting forth the grant, tenure, demise, or title of such landlord, lessor, or owner of such manor: And if the plaintiff shall become nonsuit, discontinue his action, or have judgment given against him, the defendant shall recover double costs of suit.

In order to prevent vexatious replevins of distresses taken for rent, *Stat. 11 Geo. 2. chap. 19. enacts,*

By *sect. 23.* Sheriffs and other officers having authority to grant replevins, shall in every replevin of a distress for rent take in their own names from the plaintiff and two sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more witnesses not interested, which oath the persons granting such replevin is to administer) and conditioned for prosecuting the suit with effect, and without delay, and for returning the

goods in case a return shall be awarded, before any deliverance be made of the distress; and such sheriff or officer taking such bond shall at the request and costs of the avowant, or person making cognisance, assign such bond to the avowant, and by indorsing the same, and attesting it under his hand and seal in the presence of two witnesses, which may be done without any stamp, provided the assignment be stamped before any action brought thereupon; and if the bond be forfeited, the avowant, &c. may bring an action thereupon in his own name; and the court may by rule give such relief to the parties upon such bond, as may be agreeable to justice, and such rule shall have the effect of a discharge.

Replevin for taking an ox and detaining him against gages, &c. the defendant avows that he is seized of the manor of *M.* and sets out a custom, that upon the death of a tenant he is intitled to a heriot by custom, and seized the ox, which was the property of the plaintiff's late father, who was his tenant, and lately died. The plaintiff replies that the ox was his own, and not his father's, and traverses that the ox was his father's property. Upon this issue the plaintiff was nonsuited at the trial, and the prothonotary taxed the avowant double costs, upon the *Stat. 11 Geo. 2. c. 19.* and now serjeant *Poole* moved that the prothonotary was mistaken, and ought to review his taxation, and allow only single costs, insisting that the statute did not extend to this case, which was not a distress for a heriot service, but a seizure
for

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for a heriot custom, for the words of the statute are, distresses for rent, quit-rents, reliefs, heriots, and other services; and of that opinion was the court, and ordered the prothonotary to review his taxation; although it was insisted by serjeant *Wilson* for the avowant, that this case was within the equity and meaning of the statute, though not within the very words. *Michaelmas Term, 29 Geo. 2. 1756.*

C. B. Lloyd esq; v. Winton. Wilf. Rep. 28. Barnes 148. S. C. S. P. and see 2 Wilf. Rep. 208, 209. &c.

CHAP.

C H A P. VI.

In what Cases a Tenant or other Person shall be said to commit Waste in Houses, Gardens, Woods, Pastures, Orchards, &c. and what Waste shall be punishable, and what not.

WASTE (*vaſtum a vaſtando*, to waſte) is a ſpoil or deſtruction in houſes, gardens or orchards, dove-houſes, parks, warrens, fiſh-ponds, trees, woods, lands, &c. to the prejudice of the heir, or of him in remainder or reverſion.

A licence or conſent is ſuppoſed here to be wanting.

The leſſor by law may enter at ſeaſonable times, to ſee whether any waſte is committed : And if the leſſee hinders his entering, the leſſor may bring his action on the caſe.

There are two kinds of waſte, *voluntary* and *permiſſive*. *Voluntary*, by *commiſſion* or by pulling down, &c. *Permiſſive*, by *negligence* or *omiffion*, as in not repairing. Both are equally injurious to him that hath the inheritance.

It concerns every tenant, of what nature ſoever his tenure be, to be very careful of committing waſte ; for he may in committing waſte ſoon become obnoxious to the law, and incur great damage.

I ſhall therefore, by way of caution, ſhew you in what caſes a tenant may commit waſte, ſo as to render himſelf liable to loſs and puniſhment ;
and

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and then how far a tenant may act upon his own tenure, and not commit any punishable waste.

If a tenant for life or years, or in dower, do pull down any of the houses or tenements, or suffer them to be uncovered, to the rotting or destroying of the timber or materials of the house, this is waste. *Co. Lit. 53.*

So likewise if glass windows be broken down or carried away, it is waste, though the tenant glazed them himself, for the glass is part of the house. It is also waste to take away wainscot, if it be fixed to the walls or posts of the house.

It is likewise waste to take away doors or windows, or any thing annexed or fixed to the freehold, although the tenant fixed them there himself.

If a tenant build a new house where none was before, it is waste; and if he suffer it to be wasted, it is a new waste.

The pulling down a stone-wall or mud-wall of an house, is waste. *Co. Lit. 53.*

If a tenant of a park, warren, dove-house, or the like, do not leave such sufficient stores as he found when he entered, it is waste; and so it is to suffer a park-pale to decay, whereby the deer are lost or dispersed.

Tenants have a special property in trees, as the shade, mast, &c. So that the landlord cannot enter upon the ground and cut down timber, unless he has reserved such a power, or the lease is of the land, excepting the trees; and for this, *vide 1 Lord Raym. 552. 2 Salk. 638. pl. Com. Rep. 71. pl. 44. 11 Mod. 18. pl. 5. 12 Mod. 379. Fortesc. Rep. 152. Ashmead and Ranger.*

If

If the tenant suffer the houses to be wasted, and then sell timber to repair them, this is a double waste. *Co. Lit. 53.*

Waste is properly in houses, gardens and timber-trees; that is, oak, ash, and elm, which are counted timber generally in all places; except in some copyholds elm is not.

Now these timber-trees are said to be wasted, either by cutting them down, lopping or topping them, or any otherwise decaying the timber.

And in some counties where timber is scarce, beech is accounted timber, or other trees used for building houses; and there the cutting of them is waste. *Idem.*

Or if a tenant suffer the young germins of trees to be destroyed, this is destruction, and punishable in waste.

To cut down any trees, as willows, birch or the like, which stand and grow in the defence and within view of the dwelling-house, is waste.

It is a waste to cut down hazels which grow not under the great trees, but in a quarter of the wood by themselves.

If a tenant grub up or destroy a quick fence of white thorn, it is waste. *Co. 2 Inst. f. 53.*

Burning of a house by negligence or mischance was waste, but is since made otherwise; yet if it happen through the negligence of a servant, such servant forfeits 100*l.* or to be sent to the work-house for eighteen months. See at the latter end of this treatise.

Where there is a wood, and nothing growing there but underwood, the tenant cannot cut all: But if it be a wood where great trees grow amongst

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amongst the underwood, there he may cut all the underwood.

It is waste to cut apple-trees, if they bear fruit, though they lie along the ground.

It is also waste to cut damask-trees, or any fruit-trees growing in a garden or orchard.

To dig for gravel, chalk, clay, brick, earth or stones, or the like, is waste; and so it is if a tenant dig for any mines which were not open at the time of the lease made.

To suffer a bank or wall of the sea to be in decay, so that by the flux and reflux of the sea the marsh is overflowed, so that it becomes unprofitable, is waste.

But if the sea break in suddenly by a violent tempest, it is no waste.

It is waste also if a tenant suffer the banks of any river or water to decay, whereby the ground is surrounded, or becomes unprofitable; so it is to suffer pasture-ground to be surrounded so as it becomes rushy, or arable land, so that it becomes tough clay.

It is waste for any tenant to convert arable land into wood, or meadow into arable.

The punishment in waste is treble damages, and forfeiture of the place wasted. *Stat. de Glouc.* 6 E. 1. c. 5.

There is voluntary or actual waste, and permissive waste. See p. 207.

An action of waste lieth against a tenant by the curtesy, tenant for life or years, half a year, or tenant in dower, by him that hath the estate of inheritance, in any of all these cases before-mentioned.

But

But waste doth not lie against a guardian in so-
cage, but an action of account or trespass.

Neither doth waste lie against a tenant by
elegit, statute-merchant or the staple; but an
action of account after the debt and damages
levied.

Waste doth not lie against a tenant at will;
but if such tenant voluntarily pull down houses,
or cut down timber-trees, or the like, in this case
the lord may have an action of trespass against
him. *Co. Lit. 54.*

But against a tenant in mortgage, either an ac-
tion of waste or an account will lie against him,
because his estate is conditional. *Noy's Max.*

P. 33.

If two or more joint-tenants or tenants in com-
mon be in a house, and one will repair the house,
and the other will not; in that case, he that will
repair it, may have a writ *de reparatione facienda*.

If a landlord covenant to repair the house, and
doth it not, in this case the lessee may cut timber
growing upon the ground, and repair it, though
he be not compellable thereunto, and shall not
be punishable in waste for so doing.

No man can have an action of waste, unless he
hath the immediate estate of inheritance; but
sometimes another shall join with him. *Co.*
Lit. 53.

As if a reversion be granted to two, and the
heirs of the one, they two shall join in an action
of waste.

In like manner the surviving copartners, and
the tenant by the curtesy shall join in an action of
waste.

If

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If a tenant for years commit waste and die, an action of waste lieth against his executors or administrators for waste done before their time.

If there be two *copartners* of a reversion, and one of them dies, the aunt and niece shall join in an action of waste. *Kitch. f. 244.*

If a tenant for life commit waste, and after surrender his estate, and the lessor accepts it, the lessee is discharged of the waste.

If a stranger commits waste upon the lands which one holdeth for life or years, the tenant shall suffer for it, and is left to take his remedy over, against him that did it.

If a landlord covenant to deliver timber out of the same land to repair the house let, and will not deliver it, and for defect thereof the tenant will not repair it, but suffers the house to fall down, this is waste in the tenant, and he is punishable for it, for he might have justified cutting the timber himself.

But if the timber be to be taken out of the lands, and be not delivered, then the tenant is excusable if he suffers the house to fall, and no action of waste lies against him.

If a single woman rents lands and marries, and her husband commits waste and dies, she shall be punished for this waste done by her husband. *Idem.*

But if a lease be made to a man and his wife, and her husband commits waste and dies; in this case the wife shall not be punished for such waste, unless she agrees to the estate, for she shall not be prejudiced by her husband's act during coverture.

If

If a woman be tenant for her life, and marries, and her husband commits waste, and the wife dieth, the man is not punishable for this waste: But if a woman be possessed of a term of years, and takes a husband, who commits waste, and the wife dies; here the man is liable to an action of waste, for the waste by him committed, because he enjoyeth the term of the lease. *Co. Lit. 54.*

If a man makes a lease for life or years, and after grants the reversion for years, the lessor shall have no action of waste during the years; for he himself hath granted away the reversion, in respect whereof he is to maintain his action.

If an action of waste be brought, and the term end while it is depending, yet the writ shall not abate; for although the plaintiff cannot recover the place wasted, yet he shall recover the treble damages.

Likewise if one be tenant for term of another's life, and makes waste, and afterwards the *cestui qui vie* dies, here the lessor shall recover treble damages, but cannot recover the place wasted, for that falls to him by the death of the *cestui qui vie*. *Co. 1 Par. Inst. f. 285.*

If waste be done in one corner of a wood, that place only which is wasted shall be recovered: But if it be done here and there about the wood, then the whole wood shall be recovered, or as much wherein the waste *sparsim* is done. *Co. Lit. 54.*

And so in houses, so many rooms shall be recovered wherein there is waste done.

If a man make waste in cutting trees which grow in hedge-rows which inclose pastures, nothing

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thing shall be recovered but the place wasted ; that is, the circuit of the roots, and not the whole pasture ; but if trees grow scatteringly about the pasture, then the whole pasture is forfeited if they be cut. *Pract. Reg.* 654. *B. R.*

It is a good plea in bar to a writ of waste, to say that the house fell by a sudden tempest, altho' the tenant did covenant to repair it ; but it is no plea in an action of covenant.

It is also a good plea in a writ of waste, to say that the house was ruinous at the time of the lease making, and the timber so putrified and rotten that it fell.

It is also a good plea, to say that the plaintiff had entered upon the land, before which entry no waste was made ; or that he surrendered, and the plaintiff did accept, before which time no waste was made.

If a tenant doth waste, and afterwards surrender, and the lessor agrees, yet the lessor may have an action of waste, and recover treble damages. *Co. 1 Par. Inst. f.* 285.

If an action of waste be brought by husband and wife in remainder in special tail, and the wife dieth (the suit depending) without issue ; in this case the writ of waste shall abate.

If a lease be made to hold to one without any impeachment of waste, the lessee may cut down trees, and convert them to his own use : But if the words be, to hold without impeachment of any action of waste ; in this case, if the lessee cut down trees, the lessor may have them. *Co. Lit.* 220. and *vide Lewis Bowles's* and *Herlakenden's* cases.

If a tenant for life grant a rent-charge, and after doth waste, and the lessor recover in an action

tion of waste, he shall hold the land charged during the life of the tenant for life; but if the rent were granted after the waste done, the lessor shall then avoid the grant made by the lessee for life. *Co. Lit.* 223, 224.

If a tenant in fee release to his tenant for life all his right, yet he shall have an action of waste. *Idem* 345.

And if a tenant in tail make a lease for his own life, yet he shall have an action of waste.

But if there be a tenant for life, the remainder to another in tail, and he in the remainder release to the tenant for life all his right and estate in the land, he cannot afterwards have an action of waste.

If the grantee of a reversion bring an action of waste, the lessee may plead generally, that he hath nothing in the reversion.

If a lessee before his term begin, enters into the land let to him, and do an act which amounteth unto waste, the lessor shall not have an action of waste for the same.

None shall have judgement to recover in an action of waste, where the waste comes but to 12 *d.* or such a small sum.

If waste be done upon lands let for a term of years or life, by one against whom the lessee can have no remedy in law for committing the same waste, the lessee in such case is not punishable for the same by the lessor, except there be a special covenant in the lease, that he shall not permit nor suffer waste to be done. *Co. Lit.* 303.

If the house be uncovered when the tenant cometh in, it is no waste in the tenant if he suffer it to fall down.

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The rising of a new frame of a house which was never covered, is no waste. If a house fall by a sudden tempest, or be burnt by lightning, or destroyed by enemies, or the like, without any default of the tenant, or was ruinous at his coming in, and fall down; this is no waste.

And the tenant may build the same again with such materials as remain, and with other timber growing upon the ground; but he must not make the house any larger than it was, for if he do, it is waste.

If a tenant fix a furnace, and not to the walls nor posts of the house, if he take it away within his term, it is no waste.

If a tenant in fee fix a furnace in the middle of the house, the heir shall have it, and not the executors.

If a house fall by a great wind or tempest, the lessor shall have the timber, for it is no waste, and the lessee is not bound to build it up again.

Relief in chancery for waste, *vide antea*.

Digging of land by a particular tenant is waste. *Dyer* 361. *Lit. Rep.* 293.

But not if it be for bettering the ground; Yet if a copyholder build a new house upon part of the land, it has been adjudged a forfeiture; for though the land is bettered, yet it is in another kind. *Id.* & 22 *H.* 6.

A lessee of land made it a hop-ground, and it was adjudged waste. *Lit. Rep. Ibid.* Although one acre now was better than three before; but it was in another kind.

To pull down an house is waste; but if the tenant build it up again before an action brought, he may plead that specially. 1 *Mod. Rep.* 94.

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To pull down a malt-mill, and build a corn-mill, it is waste. *Idem. Co. Lit. 53. 1 Rol. 507. 2 Rol. 815.*

If a house could not be repaired without pulling it down, it must be pleaded specially. *1 Mod. Rep. 94.*

Waste in the house is waste in the curtilage, and waste in the hall is waste in the whole house. *Idem.*

To convert a brewhouse into tenements is waste also, although they be of greater value. *1 Lev. 309.*

As is observed before, if a tenant make waste in cutting of wood or timber contrary to the provisos, exceptions or covenants in his lease; for such a breach the landlord may bring his action or covenant before the end of the term.

Now waste is a forfeiture, but if a copyholder by custom hath been fined, or removed it, that proves that it is no forfeiture; for where the law gives the lord another Recompence, it will not make a forfeiture: And the lord may pursue a copyholder with amerciaments till he pluck up a hedge. *Lit. Rep. 267.*

*Concerning the Destruction of Corn, Wood,
8cc.*

By Stat. 43 *Elix. c. 7. sect. 1.* "All lewd persons, which shall cut or unlawfully take
" away any corn growing, or rob any orchards
" or gardens, or break or cut any hedge, pales,
" rails of fence, or dig, pull up or take up,
" any fruit-trees, to the intent to take the same
" away

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“ away, or shall cut or spoil any woods or underwoods, poles or trees standing, not being felony, and their procurers or receivers knowing the same, being convicted by confession, or one witness, before some justice of peace, mayor or other head officer, where the offence shall be committed, or the party apprehended, shall give such recompence for the damages as by such head officer or justice of peace shall be appointed, for the first fault; and if such offenders shall be thought in the discretion of the justice, &c. not able, or do not make satisfaction for the damages, the justice, &c. shall commit the offenders to some constable or other inferior officers of the city, &c. or hamlet where the offence shall be committed, or the party apprehended, to be whipped; and for every such offence for which the offenders shall be afterwards committed, and to receive the said punishment of whipping.”

By Sect. 2. “ If any constable or inferior officer do not, at the command of any justice of peace or other head officer, execute by himself or some other the punishment limited by this statute, it shall be lawful for the justice to commit the constable, &c. to the common gaol; until the offenders be by the said constable, or by his procurement, whipped.”

By Sect. 3. “ Provided that no justice of peace, or other head officer, do execute this statute for any the offences aforesaid done unto himself, unless he be assisted with one or more other justices of the peace whom the offence doth not concern.”

By

By *Stat. 15 Car. 2, c. 2. s. 2.* “ Every constable or other person shall have power to apprehend all persons they shall suspect, having or carrying away any burden of wood, bark or basts of any trees, or any gates, stiles, posts, rails, rails or hedge-wood, broom or furze; and by warrant of one justice of peace any officer shall have power to search the houses or other places of all persons they shall suspect to have any wood, poles, young trees or bark or basts of trees, or any gates, &c. and where they shall find any such, to apprehend all persons suspected for taking the same, and them to carry before a justice of peace: and if they do not give a good account, how they came by such wood, &c. or shall not within some convenient time, to be set by the justice, produce the party of whom they bought the same, or some witness to depose such sale of the wood, &c. they shall be convicted of the offence of cutting and spoiling of the same woods, &c. within the statute, 43 *Eliz. c. 7.*”

By *Stat. 3.* “ Every person convicted shall for the first offence give the owner such damages as the justice shall appoint, and pay down to the overseers of the poor such sum, not exceeding 10*s.* as the justices shall think meet: And if such offender do not make satisfaction to the owner, and pay to the poor, in manner aforesaid, the justice shall commit him to the house of correction, not exceeding one month, or to be whipped by the constable. And if such person shall again commit the said offence, and be convicted, he shall be sent to the house of correction for one month, and kept to hard labour,

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“bour. And if such person shall again commit
“the said offence, and be convicted the third time,
“he shall be deemed an incorrigible rogue.”

By *Seft. 4.* “Whosoever shall buy any bur-
“dens of wood, poles or sticks, which may be
“justly suspected to have been unlawfully come
“by, it shall be lawful, for one justice, upon
“complaint, to examine the matter upon oath;
“and if they shall find that the same was bought
“of a person who might justly be suspected to
“have unlawfully come by the same, and that
“the same was unlawfully come by, the justice
“shall award the party to pay treble the value to
“the party from whom the same was unlawfully
“taken, and in default of present payment, to is-
“sue warrants to levy the same by distress and sale
“of goods, and in default of distress, to commit
“the party to gaol, there to remain one month.”

By *Seft. 5.* “No person shall be questioned
“for any thing upon this law, that hath been
“punished for the same by any former law; nor
“unless he be questioned within six weeks after
“the offence.”

By *Stat. 22 & 23 Car. 2. c. 7. s. 5.* “If any
“person shall in the night-time maliciously and
“unlawfully maim, wound or hurt, any horses,
“sheep or other cattle, whereby the same shall
“not be killed, or shall destroy any plantations
“of trees, or throw down any inclosures, such
“offenders shall forfeit unto the party grieved
“treble the damage, to be recovered by action
“of trespass, or upon the case, at common law.”

By *Seft. 6.* “Upon request of the party in-
“jured, any three justices of peace (whereof one
“of the *quorum*) may inquire, as well by the
“oaths

“ oaths of twelve men as by examination of
 “ witnesses, and issue out warrants, as well for
 “ the summoning of jurors, as for the appre-
 “ hending of persons suspected, and to take their
 “ examination, as also to cause other persons to
 “ appear and give information upon oath con-
 “ cerning the premises; so as no person be pro-
 “ ceeded against for any offence concerning
 “ which he shall be examined as a witness, and
 “ shall make a true discovery thereof; and in case
 “ any person shall refuse to be examined, being
 “ duly summoned; it shall be lawful for the jus-
 “ tices to commit the party so refusing to the
 “ common gaol, until he shall submit to be ex-
 “ amined upon oath.”

By *Stat. 7.* “ Provided that no person, who
 “ shall be punished for any offence by this act,
 “ shall be punished for the same by any other
 “ law; nor shall be questioned for the same, un-
 “ less he be proceeded against within six months
 “ after the offence.”

By *1 Geo. c. 48. s. 1.* “ If any person shall ma-
 “ liciously break down, cut up, bark, destroy or
 “ spoil, any timber-tree, fruit-tree, or other tree,
 “ the person damaged shall receive such satisfac-
 “ tion from the inhabitants of the parish, town,
 “ hamlet, vill, or place, to be viewed, and costs
 “ to be recovered, in the same manner as hedges
 “ overthrown in the night, by *13 Edw. 1. c. 46.*
 “ and where such offence shall be committed in
 “ Scotland, to be recovered by way of summary ac-
 “ tion, as damages in other cases of riot; unless
 “ the party offending shall by such parish, &c. be
 “ convicted of such offence within six months.”

By

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By *Stat. 2.* " Any two justices of the county,
" *Sc.* or the justices in sessions, on complaint by
" any inhabitant of such parish, *Sc.* or of the
" owner of the trees, or of any other, may cause
" such offender to be apprehended, and hear and
" determine the offences aforesaid; and on con-
" viction of such offender shall commit him to
" the house of correction to be kept to hard la-
" bour for three months; and where there are
" no houses of correction, the justices shall com-
" mit him to prison for four months; and shall
" also order that such offender be publicly whip-
" ped by the master of such house of correction
" once every month during such three months,
" in such borough or corporation, if the offence
" be committed therein; or in the market-town
" where such house of correction stands, or in the
" next market-town in the county, on the mar-
" ket day, between the hours of eleven and two;
" and where there is no house of correction, the
" justices shall order such offender to be whipped
" by the hangman once every month, during such
" four months, on the market day where such of-
" fender shall be committed, or on the market day
" of some town, between the hours aforesaid."

By *Stat. 3.* " Before such offender be dis-
" charged, he shall find sureties for his good be-
" haviour for two years."

By *Stat. 4.* " If any person shall maliciously
" set on fire, burn, or cause to be burnt, any wood,
" underwood or coppice, such malicious setting
" on fire is made felony: And where such of-
" fences are committed in *Scotland*, the offenders
" shall suffer as wilful fire-raisers, according to
" 7 *Ann. c. 21.*"

By *Stat. 6 Geo. c. 16. s. 1.* " If any person
 " shall either by day or by night cut, destroy,
 " bark, deface, spoil or carry away, any wood
 " springs, trees, poles, woods, tops of trees, un-
 " der-woods or coppice-woods, thorns or quick-
 " sets, without consent of the owner; or shall
 " break open, throw down or destroy, any hedges,
 " gates, posts, stiles, fences, ditches, or other in-
 " closures of such woods, wood-grounds, parks,
 " chases or coppices, plantation of trees, thorns
 " or quicksets; the lords of manors or owners
 " who shall be damaged thereby, shall have such
 " remedy from the inhabitants of the parishes,
 " towns, hamlets, villages or places, joining to
 " such wood, springs, &c. as for hedges over-
 " thrown in the night, by 13 *Edw. 1. c. 46.*
 " unless the offender shall by such parish, &c. be
 " convicted of such offence within six months."

By *Stat. 2.* " If any person in a riotous, open,
 " tumultuous, or in a secret and clandestine man-
 " ner, wrongfully and maliciously shall cut down,
 " destroy, burn, carry away, &c. any wood, or
 " springs of woods, &c. or shall in such riotous,
 " &c. manner, maliciously break open, throw
 " down or destroy, any hedges, gates, posts or
 " other inclosures of such woods, &c. any two
 " justices of peace, or the justices in sessions,
 " upon complaint made by any inhabitant or
 " other, may cause the offender to be apprehend-
 " ed, and hear and determine such offences; and
 " if such justices shall convict any person of
 " the trespasses aforesaid, they shall inflict the
 " penalties in 13 *Ed. 1. c. 46.*"

By *Stat. 3.* " If any person be prosecuted for
 " any thing done in pursuance of this act, or

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“ Geo. c. 48. the defendant may plead the general issue, &c. and recover treble costs.”

By 6 Geo. 3. c. 36. “ All persons who shall, in the night-time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil, destroy, or carry away any oak, beech, ash, elm, fir, chesnut, or asp, timber-tree, or other tree or trees standing for timber, or likely to become timber, without the consent of the owner first had; or shall, in the night-time, pluck up, dig up, break, spoil, destroy, or carry away, any root, shrub, or plant, roots, shrubs, or plants of the value of 5s. growing or being in the garden ground, nursery ground, or other inclosed ground, of any person or persons whomsoever; shall be deemed guilty of felony, and be subject to the like pains and penalties as in cases of felony; and the court, before whom they shall be tried, are authorized to transport such persons, for seven years, to any of his majesty's plantations in *America*, in like manner as other felons: And all persons who shall be wilfully aiding, abetting, or assisting, in any the offences aforesaid, or who shall buy, or receive such roots, shrubs, or plants, of the value aforesaid, knowing the same to be stolen; shall be subject to the same punishment as if they had stolen the same.”

By Stat. 6 Geo. 3. c. 48. s. 1. “ Every person who shall wilfully cut or break down, bark, burn, pluck up, lop, top, erop, or otherwise deface, damage, or destroy, or carry away, any timber-tree or trees likely to become timber, or any part thereof, or the lops or tops thereof, without the consent of the owner first had; or,

“ in any of his majesty’s forests or chases, with-
 “ out the consent of the surveyor, or his deputy,
 “ or person intrusted with the care of the same;
 “ and shall be convicted upon the oath of one
 “ credible witness before any justice or justices
 “ for the county or place wherein such offence
 “ shall be committed, shall, for the first offence,
 “ forfeit such sum not exceeding 20*l.* as to such
 “ justice or justices shall seem meet, together
 “ with the charges previous to and attending such
 “ conviction, to be ascertained by such justice,
 “ &c. and upon non-payment, such justice &c.
 “ shall commit him to the common gaol of the
 “ county or place where the offence shall be com-
 “ mitted, without bail or mainprize, for any time
 “ not exceeding twelve months, nor less than
 “ six months, or until the penalty and charges
 “ shall be paid; and being guilty of the like of-
 “ fence a second time, and convicted in like
 “ manner, he shall forfeit such sum, not exceed-
 “ ing 30*l.* as to such justice or justices shall seem
 “ meet, together with the charges previous to
 “ and attending such conviction, to be ascertain-
 “ ed by such justices, &c. and upon non-payment,
 “ shall be committed, without bail or mainprize,
 “ for any time not exceeding eighteen months,
 “ nor less than twelve months, or until the pe-
 “ nalty and charges shall be paid; and being
 “ guilty of the like offence a third time, and con-
 “ victed in like manner, he shall be deemed guilty
 “ of felony; and the court before whom he shall
 “ be tried, shall transport such person for the
 “ space of seven years, to any of his majesty’s
 “ plantations in *America*, in like manner as other
 “ felons.”

By

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By *Stat.* 2. " All oak, beech, chestnut,
" walnut, ash, elm, cedar, fir, asp, lime, sycamore and birch trees shall be deemed timber-trees within the meaning and provision of this act."

By *Stat.* 3. " Every person who shall pluck
" up, or cut, spoil, or destroy, or carry away any
" root, shrub, or plant, roots, shrubs, or plants,
" out of the fields, nurseries, gardens, or garden-grounds, or other cultivated lands, of any person, without the consent of the owner first had, and shall be convicted upon the oath of
" any one or more credible witness or witnesses,
" before any justice or justices for the county or place wherein such offence shall be committed, shall, for the first offence, forfeit such sum as to
" such justice, &c. shall seem meet, not exceeding 40s. together with the charge previous to
" and attending such conviction, to be ascertained by such justice, &c. and committing again the
" like offence, and convicted in manner aforesaid, shall forfeit such sum as to the said justice, &c. shall seem meet, not exceeding 5*l.*
" together with the charges previous to and attending the conviction; and committing again
" the like offence, and being convicted the third time, he shall be deemed guilty of felony; and
" the court, before whom he shall be tried, shall transport such person, for the space of seven
" years, to any of his majesty's plantations in
" America, in like manner as other felons."

By *Stat.* 4. " All persons who shall go into
" the woods, underwoods, or wood-grounds, of
" any of his majesty's subjects, not being the law-

“ ful owners thereof, and shall there cut, lop,
 “ top, or spoil, split down or damage, or other-
 “ wise destroy, any kind of wood or underwood,
 “ poles, sticks of wood, green stubs, or young
 “ trees, or carry away the same; or shall have in
 “ his, her, or their custody, any kind of wood,
 “ underwood, poles, sticks of wood, green stubs,
 “ or young trees, and shall not give a satisfac-
 “ tory account how he, she, or they, came by
 “ the same; and shall be convicted before any
 “ one or more justices of the peace, on the
 “ oath of one or more credible witness or wit-
 “ nesses; shall, for the first offence, forfeit and
 “ pay immediately, on conviction, any sum not
 “ exceeding 40s. together with the charges pre-
 “ vious to and attending such conviction, to be
 “ ascertained by the said justice or justices; and
 “ committing any of the said offences a second
 “ time, and being again convicted, shall forfeit
 “ and pay any sum not exceeding 5*l*. together
 “ with the charges previous to and attending
 “ such conviction, to be ascertained as aforesaid;
 “ and committing any of the offences aforesaid a
 “ third time, and being duly convicted according
 “ to law, shall be deemed incorrigible rogue or
 “ rogues, and be punished as such.”

By *Stat. 5*. “ The justices of the peace for the
 “ respective counties or places wherein any of
 “ the offences against this act shall be done, are
 “ authorized to put this act in execution, and to
 “ administer an oath to any such credible wit-
 “ nesses or witnesses.”

By *Stat. 6*. “ Such justice or justices, unless
 “ the respective forfeitures shall be paid down
 “ upon conviction forthwith (where not other-
 “ wise

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“ wise directed by this act) may commit such
“ offenders, for the first offence, to the house of
“ correction for one month, to hard labour, and
“ to be once whipped there; and for the second
“ offence (where not otherwise directed by this
“ act) to the house of correction for three months,
“ to hard labour, and to be whipped there once
“ in every one of the said three months.”

By *Sect. 7.* “ If any person shall, at any time,
“ hinder, or attempt to prevent the seizing or
“ securing any person employed in carrying away
“ any such timber, or other trees; he shall, for
“ every such offence, forfeit 10*l.* to the person
“ or persons who shall convict such offender; and
“ if not immediately paid on conviction, he shall
“ be committed to the house of correction, to
“ hard labour, for any time not exceeding six
“ calendar months.”

By *Sect. 8.* “ One moiety of all the before-
“ mentioned forfeitures (not otherwise directed)
“ shall go to the informer, and the other moiety
“ to the person aggrieved.”

By *Sect. 9.* “ The conviction of offenders
“ against this act shall be certified, by the justices
“ before whom the same shall be made, to the
“ next general or quarter-sessions of the peace, to
“ be filed amongst the records of the said ses-
“ sions; and shall not be quashed, or adjudged
“ void or insufficient, for want of form; nor
“ be liable to be removed by *Certiorari* into the
“ court of *King's Bench*, but shall be deemed to
“ be final to all intents and purposes.”

C H A P. VII.

*The Doctrine concerning Common of cattle, &c.
between Landlord and Tenant.*

Common signifieth, in our common law, that soil or water, whereof the use is common to this or that town or lordship; as common of pasture, (termed *communio pasturæ*). *Bract.* l. 4. c. 19 & 40. or a common (because it is common to many) is a profit that a man hath in the land of another.

Common of pasture is a right of putting beasts to pasture in another man's soil.

Common of fishing, *communio piscaria*, is a liberty of fishing in another man's ground.

Common of turbary, *communio turbaria*, is a licence for digging of turf upon another's ground, or in the lord's waste.

Common of estovers, *communio estoveriorum*. *Kitch. f. 94.* See *Estovers* in *tabula*.

Again; Common (*i. e.* common of pasture) is divided into, 1. common in gross; 2. common appendant; 3. common appurtenant; 4. common by reason of vicinage (neighbourhood.) *Vide O. Lit. 121. a.*

Common in gross is a liberty of commoning conveyed alone without land by deed, or gained by usage time out of mind. So that common appendant cannot be common in gross. 1 *Inst.* 30. b. 32. a. 122. a. 164. b. 4 *Rep.* 30.

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Mr. Cowel says, That common appendant and common appurtenant are in a manner confounded, as appears by *Pitz. Nat. Brev. f. 180.* and are defined to be a liberty of common appertaining to, or depending of such and such a freehold; yet *Kitch. f. 94.* seems to make this difference, That he which hath common appurtenant, hath it without limitation of this or that kind of beasts; but that this again is controlled by *Dyer, f. 70. b. Numb. 19.* And that he who hath common appendant, hath it but for beasts commonable, as horses, oxen, kine and sheep, being accounted fittest for the ploughman, and not of goats, geese and hogs. Whereupon the author of the *New Terms of the Law* addeth another difference, which is, That common appurtenant may be severed from the land whereunto it is appurtenant, but not common appendant.

The original of common appendant is expressed in *4 Lib. Co. Rep. f. 34.* to this purpose, viz: That when a lord enfeofed another in arable lands to hold of him in socage, as all tenure in the beginning (according to *Littleton*) was; the feoffee, to maintain the service of his plough, had common in the waste of the lord for his necessary beasts to gain and compost his land, and that for two causes: One that for that (as then it was taken) it was tacitly implied in the feoffment, by reason the feoffee could not gain or compost his land without cattle, and cattle could not be sustained without pasture; and so by consequence the feoffee had, as a thing necessary and incident, common in the wastes and land of the lord. The second reason was, for maintenance and advancement of tillage, which is much regarded and favoured in the law.

Common

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Common for cause of vicinage, or because of neighbourhood, is a liberty that the tenants of one lord in one town have to common with the tenants of another lord in another town: Which kind of common they that challenge may not put their cattle into the common of the other town, for then they are distrainable; but turning them into their own fields, if they stray into their neighbour's common, they must be suffered. See the *Terms of the Law*, and *Cowel's Interp. verb. Common*.

That if there be common by reason of vicinage between two manors time out of mind, &c. yet one may inclose against the other, *Co. Lit.* 122. 4 *Co.* 38. b. So it is said, if he incloses any part of his common, the common *pur cause de vicinage* is gone. But in such a case, if the lord of one manor incloses, he shall not bind a copyholder of the same manor, but that he may have common for cause of vicinage as he had before. *Mich.* 3 *Jac. per Hobart.*

Where there is common for cause of vicinage between two, yet one cannot put his cattle into the land of the other, but they ought to escape there of themselves by reason of the vicinity, for this is but an excuse of the trespass. *Co. Lit.* 122.

It was said, That every common for cause of vicinage, is a common appendant, and that a man for such reason need not prescribe; but that it is sufficient to say, That he and all those whose estate, &c. have used to intercommon *causa vicinagii*; but yet it is doubtful, and 13 *H.* 7. 13. b. there is a prescription for common *causa vicinagii*. And in *Poph.* 201. *dubitatur*, whether it was sufficient that

he

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he and all the occupiers of, &c. have had,
&c.

Resolved *per cur.*

That if there be common for cause of vicinage between the towns of *A.* and *B.* and *A.* hath fifty acres of common, and *B.* hath an hundred acres of common, the inhabitants of *A.* cannot put more cattle into their common than the fifty acres will depasture, without any regard to the common of *B.* for the original cause of this common was not the profit of their town, but to prevent suits in open countries for reciprocal escapes from one field into the other. 7 *Co.* 5. *b.*

As for *shack* in the county of *Norfolk*, (which is a sort of common for the cause of vicinage) and the commencement thereof, *vide* 7 *Co.* 5.

Before we see farther into common appendant, &c. it will be convenient to inquire after the common of the lord.

For Common as Lord.

The lord of the manor, seised of the wastes in which the tenants have common, may, it is said, feed the common by part or all, of common right, without disturbance, 18 *E.* 3. 43. 18 *Aff.* 4. But whether the lord by prescription may be restrained to a certain number, *vide* 2 *Roll. Abr.* 267. *Pla.* 2.

If the owner of the soil grants to another common without number there, yet the grantee cannot use the common with so many cattle, that the grantor shall not have sufficient common for his cattle. 12 *H.* 8. 2. *Brig.* 5. 1 *Roll. Rep.* 365.
1 *Saund.*

1 *Saund.* 345. *Co. Lit.* 122. a. 1 *Roll. Abr.* 339. Pl. 5.

So where a man claims common without number by prescription or custom, for it is against the nature of the word *common* to exclude the owner of the soil, and it was implied in the first grant, That the owner of the soil should take his reasonable profit there. *Co. Lit.* 122. 2 *Roll. Abr.* 265. Letter E.

It is clear that occupiers or inhabitants cannot claim this common by prescription. *Quærit*, Whether they may lay a custom for them to have it. *Lord Raym.* 406, 407.

And though *per F. N. B.* 125. D. Common without number is not admeasurable; yet if the commoner surcharges it, the lord may distrain. *Vide* 1 *Saund.* 345.

The lord by prescription may agist the cattle of a stranger in the common, but without prescription he cannot. 30 E. 3. 27.

He may license a stranger to put in his cattle, if he leaves sufficient common for the commoners. 2 *Mod.* 6, 7, 275.

And if *A.* grants common to *B.* in a certain place, *A.* cannot afterwards erect a rick there; for by the grant the cattle of *B.* are to range over the whole place without restraint, and it shall not be in the power of *A.* to defeat his own grant. *Cro. Jac.* 271, 272. *int'* *Farmer & Hunt.* *Vide* *Yelv.* 201, 202.

If the lord alien in fee the soil where the common is to be taken, saving his power of feeding as lord, he shall have common there as lord. 18 E. 3. 34.

And

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And if the lord, without any saving, aliens the soil where the common is to be taken, his common as lord is gone by the feoffment; but the alienee of the soil may feed it as the lord might have done before: For that this common is given, because it is in his soil where the lord has it, and not because he is lord. *Ibid.*

Of Common Appendant.

That common appendant is of common right.
26 H. 4.

Common appendant is a right belonging to one's *arable* land, of putting beasts commonable into another's ground to feed there.

That it is not common appendant, unless it has been appendant time out of mind. 40 Ed. 3. 10. b. *Ksilw.* 129. b. *Bro. Com.* 16. 51 *Aff.* 2. For such common cannot be created at this day. 5 *Aff.* 9. *Fitz. Affine* 134. 26 H. 8. 4.

That common appendant may be through all the year, saving a certain time, at what time the lord feeds it. 27 E. 3. 86. b.

Whether claiming common *a tempore fractionis campi* is good or not. *Lord Raym.* 645.

Also it seems, that common appendant may be limited upon condition. 37 H. 6. 34. *Fitz. Tresp.* 85. *Br. Common* 13.

That common appendant may be unlimited; so *quamdiu* he pays so much; so *tamdiu* as he shall be living upon such a house to which the common is appendant. *Ibid. ut supra.*

So common appendant may be to common after the corn is severed till it is re-sowed. 37 H. 6. 34. And if part only is re-sowed, he may
common

common in the residue. *Ydo.* 185. 2 *Brownl.* 189. *Br. Common* 13.

So it may be to common in the meadow after the hay carried, till *Candlemas*. 17 *Eliz.* 3. 26. b. 34.

So it may be to common in the pasture from the feast of *St. Augustine* to *All-Saints*, &c. *Ibid.*

So it may be to common two years after the corn cut and carried away, till it is re-sowed, and every third year *per totum Annum*. 22 *Aff.* 42.

Vide 2 Saund. 349, 344.

That a man may have a common appendant for thirty cattle in one place, and to the same land, common appendant also in another place for part of the said cattle, and so may take it where he pleases. 17 *Ed.* 3. 34. b.

That a man may prescribe for common in certain lands from the time the corn is severed, until the land shall be sowed again by the assent of the commoners; for by the law the owner cannot plough where another hath common. 1 *Leon.* 73. *int. Hawks and Molineux.*

So a man may prescribe for pasturage for two geldings in a thousand acres of meadow, from the first day of *May* till the grass be there cut and made into hay; for being in so great a quantity of land, the going of two geldings there cannot so defoul or debruiſe it, but that hay may well be made thereof. *Gra. Jac.* 37. *int. Sir John Thomas and Laffels.*

It ought to be appendant to arable land, but not to other land which is not arable, nor to a house: Neither can it be appendant to land which is approved within time of memory out of the waste of the lord: Neither can common of turbary be

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be appendant to land. 26 H. 8. 44. 5 Aff. 2.

9. Br. Com. 13, 16. Fita. Affix. 134.

Also it ought to be for such cattle as plough his land (to which it is appendant, as it seems) and compester it, viz. horses and oxen to plough the land, and cows and sheep to compester it. 37 H. 6. 34. Br. Com. 13. Com. Lit. 122.

But he may not use it with goats, geese, or such like, for these are not necessary to do, *ut supra*. 37 H. 6. 34. Br. Com. 13.

And therefore a prescription to have common appendant for all manner of cattle is not good, because it comprehends goats, geese, and such like; but this is common appurtenant. 37 H. 6. 34. Br. Com. 13, 14. 1 Roll. Abr. 401. pl. 2.

Again, the common is admeasurable according to the quality and quantity of the freehold, to which he claims to have this common appurtenant. 37 H. 6. 34. Br. Com. 13. *Vide postea* concerning admeasurement.

Viz. For all those which are levant and couchant upon the land. 15 Ed. 4. 32. 3. 11 H. 8. 12. Br. Com. 8. And *per* Noy 30. *dubitatur*, what cattle shall be levant and couchant; but there said, That the chief justice in the circuit held, for so many cattle as the land to which, &c. may maintain in the winter, shall be said levant and couchant. *Vide i Vent.* 54. And that so many beasts may be said levant and couchant upon a house as may be tied there, and are usually to be maintained in the house. 1 Brownl. 101. But *per* Vaugh. 253. in a common intent, cattle cannot be levant upon a messuage only.

That

That he who claims common by force of a prescription, as an inhabitant of a town, shall have no other cattle to common there but what are levant and couchant within the same town. 15 Ed. 4. 32. b. Br. Com. 8. For there is no diversity between this and common appendant. *See after.*

That common appendant may by usage be limited to any certain number of cattle. 17 E. 3. 27. 34. b.

Generally the commoner cannot use the common but with his own proper cattle. 11 H. 6. 22. b. Fitz. Com. 3. Br. 47. 22 Aff. 84. Br. Com. 40. Fitz. Aff. 228.

If a commoner hath not any cattle to manure the land, he may borrow other cattle to manure it, and may use the common with them, for by the loan they are in a manner made his own cattle. 45 E. 3. 26. 11 H. 6. 22. b. 14 H. 6. 6. b. 22 Aff. 84. Br. Com. 5. 14. 406. Br. Saisin 5. Fitz. Com. 3. 57. Fitz. Tres. 83. Fitz. Aff. 228.

He cannot agist the cattle of a stranger. 11 H. 6. 22. a. 11 b. 22 Aff. 84. Fitz. Com. 3. Br. 40. 47. Fitz. Aff. 228.

If he takes the cattle of a stranger to fold, and folds them accordingly, being levant and couchant upon the land, he may use the common with these cattle, for he has a special property in them for the time. Mich. 10 Car. B. R. in Jafon and Hellyard, per cur.

Where common is grantable over or not, vide Roll. Abr. 46. pl. 15, 16.

If a man as inhabitant of a town claims common for all manner of cattle in a place, and claims

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claims the common by reason he is an inhabitant there, he shall have no other beast to common there, but those that are levant and couchant: And if a man grant *sans* number, the grantee cannot put in so many cattle, but so that the grantor may have sufficient common in the same land. 12 H. 8. 2. 15 E. 4. 32. b.

That a man may prescribe to have common for all manner of cattle by reason of his person. 15 E. 4. 33. Br. Com. 8. Vide 1 Roll. 366, 398. Br. Com. 48.

But if a man claims common by prescription for all manner of commonable cattle in the land of another, as belonging to a tenement, this it is said is a void prescription, because he does not say it is for cattle levant and couchant upon the land to which he claims it to be appurtenant, for a man cannot have common *sans* number appurtenant to land; and when he claims the common for all cattle commonable, and does not say for cattle levant and couchant upon the tenement, this shall be intended common *sans* number according to the words; for there is not any thing to limit it, when he does not say for levant and couchant; adjudged in error, in *Cobham and White, Mich.* 14 Car. 1st. 403, 404.

Said to be nought upon a general demurrer, but that is helped after verdict, in *Chesdale and Miller.* Vide 1 Lev. 196. 1 Saund. 227, 228. 1 Vent. 164, 165. 1 Mod. 6, 7, 75. 3 Mod. 162. Co. Ent. 656. Cro. Jac. 44.

But if a man prescribes for common for a certain number of cattle, as belonging to certain land, he need not say levant and couchant. 2 Mod. 185. See the diversity adjudged, and 1 Roll.

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Roll. Abr. 401. pl. 4. *1 Vent.* 163. *1 Mod.* 75.
Cro. Jac. 27.

It is doubted whether a corporation may prescribe, That every burgess of the said corporation hath time out of mind had common in gross *sans* number in a certain place for all their cattle; *int* *Miller and Spateman*, *1 Saund.* 345, 346. And that the chief justice positively said, There could be no common in gross *sans* number. *Vide 1 Mod.* 6, 7. *dubitatur.*

But *2 Jones* 115, *2 Lev.* 246. in an action between the same parties for a disturbance in the usage of the common, it seems to have been adjudged a good prescription. *Vide Hard.* 111. Yet *vide Co. Lit.* 122. this is one of the commons there enumerated: And *3 Mod.* 209, *arguendo* admitted, but said, The prescription must not be laid to be *ad libitum suum.* *Et vide March* 83.

Prescription for common *omni tempore anni*,* in a forest, &c. and it was not found to be a forest.

If in bar to an avowry for *damage-feasant* the defendant prescribes for the common in the place where, &c. *pro omnibus equis*, &c. and so justifies the putting in his gelding there; this is a good plea, for *equus* is a general name, and comprehends geldings as well as horses, and geldings in common speech are called horses, but for mares it is not so; adjudged. *Cro. Eliz.* 798. *int* *Stapleton and Morse.*

If in bar of an action of trespass the defendant pleads, that he, and all those whose estate he hath

* See p.

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in the manor of *M.* have time out of mind had pasturage for two geldings in the place where, and so justifies; this is a good plea, for such common may be claimed by the name of pasturage; adjudged. *Cro. Eliz.* 27. inter *Sir John Thornbill* and *Lassels*.

If a man in bar to an avowry for *damage-feasant* prescribes, That he, and all those whose, &c. have had common *pro magnis averiis* (for great beasts) in the place where, &c. and so justifies his putting in the geldings to use the common; this is a good plea: For *magna averia* may well be intended horses, oxen, kine, or such other beasts of these kinds which are commonable, and by the common phrase of people are well known amongst them, and there needs no averment that the gelding was one of the *magna averia*; adjudged. *Cro. Jac.* 508. int' *Standred* and *Shoreditch*.

But whether a man may prescribe for common *pro Magnis Averiiis*, viz. *pro Bidentibus*, &c. *1 Saund.* 227. *dubitatur*. And the chief justice said, Sheep were great beasts in respect of conies, &c.

Vide 2 Roll. Rep. 173. where the case of *Standred* is adjudged, and there said, That all manner of cattle, except sheep and yearlings, should be called *magna averia*.

If a man hath time out of mind had common of estovers in a certain place to be burnt in such a house, and to mend the old houses and old hedges; this is not common appendant, but appurtenant. *11 H. 6.* 11 *b.*

And if a man and his ancestors, and all those whose estate he hath in a house, have had common for two beasts in a certain place; this also is not appendant, but appurtenant. *11 H. 6.* 12.

By

By *Holt* chief justice, a man may prescribe for common for cattle levant and couchant upon a messuage, but not for common appurtenant to a farm, because it is uncertain of what a farm consists, perhaps of ten acres, or of an hundred acres, but the prescription ought to be laid to a messuage and so many acres of land; but if there is an ancient farm, and the same lands always occupied with it, a man may have common of pasture to depasture his cattle, tilling that farm. *Lord Raym.* 726. *Hockley v. Lamb.*

Ruled by *Holt* chief justice, if a man prescribes for common for a certain number of cattle as appurtenant, &c. it is not necessary nor material to shew that they were levant and couchant, because it is no prejudice to the owner of the soil, for that the number is ascertained. *Ibid.* *Richards v. Squibb.* 2 *Lord Raym.* 1015.

In replevin the defendant justifies taking *damage-feasant* in his freehold; plaintiff in bar, that he is seised of a cottage, and prescribes for common in the defendant's land for all his cattle levant and couchant as appendant to his cottage; and held well on demurrer, for a cottage has a curtilage, or at least a court to it. 2 *Lord Raym.* 1015. *Salk.* 169.

Upon a grant of common by a deed of bargain and sale of *Blackacre*, which deed is afterwards inrolled; this was held a good common appurtenant to B. although the grantee had nothing in the land at the time of the grant; and though it shall not relate to settle the estate in him *ab initio*, inasmuch as this has reference to the bargain and sale, and to the estate which he had by force thereof. *Mich.* 15 *Jac. B. R. inter Gavon and Stacy.*

And

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And so it is where the grant of common had reference to that which a man should afterwards purchase; for it is not necessary that he should have the land at the time of the grant. *Ibid.*

So if a man bargains and sells *Blackacre* to *B.* and after, before the deed is inrolled, by another deed grants a common to the said *B.* for all the cattle which should manure and eat the said *Blackacre*, and after the deed is inrolled; this shall be a good common appurtenant to the said *Blackacre*; and the court said it should be so without any help of relation. *Int' easdem partes ut supra.*

So where a man grants to *B.* common for all cattle which manure *Blackacre*; and after he purchases it; this was said to be a good common appurtenant to this acre upon a contingent, tho' he had nothing in it at the time, *Uc. int' easdem partes ut supra*; but here is made a *quære*, inasmuch as the grant had no reference to a future purchase. *Vide 1 Roll. Abr. 400. pl. 5, 6.*

H. seised in fee of a waste called *W. Heath*, granted to the prior of *S.* and his tenants in 81 common in *W. præd.* *Habund'* to them and their successors as tenants in fee; and this was said to be common appurtenant to the said land which the prior had in *S.* aforesaid, for that it could not be a common *sans* number, but referred to the land. *Inter Sacheverell and Porter, 1 Roll. Abr. 400. pl. 7. Cro. Car. 482. 1 Jones 297. Adjudged upon a special verdict.*

One granted to another a certain assart with common of turbary, as belonged to two hides of land, with the appurtenances in *D.* and this was said to be a common in gross, being a grant *de novo*,

○

novo,

And

now, not by prescription, and not appurtenant to the said assart; adjudged. 5 *Aff.* 9. *Fitz. Affs.* 134.

If *A.* as appurtenant to a certain messuage, and twenty acres of land, hath common in the land of *B.* and after *B.* enfeoffs *A.* of the said lands, in which, &c. by which the common is extinguished; and after *A.* releases to *B.* the said messuage and twenty acres of land, with all commons, profits and commodities thereunto appertaining, or occupied, or used with the said messuage; this is said to be a good grant of a new common for the time. *Trin.* 39 *Eliz.* in *Bradshaw* and *Eyre*, *Cre. Eliz.* 570.

But because it was not there averred, that this common was therewith used at the time of the lease, it was adjudged against the defendant who claimed the common.

So if a copyhold messuage escheats, to which before common in the demesne of the lord did belong, and the lord by deed grants it by the name of a messuage, &c. and of whatsoever common to the said messuage belonging, &c. or with the same used. 2 *And.* 168. *Cre. Eliz.* 794.

If a man prescribes to have common of estovers to his freehold, *scil.* a house, he cannot prescribe to fell the wood, for this cannot be appurtenant. 11 *H. 6.* 11 *b.* *Vide* *Noy* 145. but must shew they are to be burnt or spent in the house. 1 *Sid.* 354. But he may prescribe to build new houses. *Cre. Jac.* 25.

So a man may prescribe to have as much turf yearly as two men can dig in one day. 1 *Leo.* 231.

A man

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A man may prescribe to have common appurtenant to a manor for all manner of cattle. 14 H. 6. 6. b. And it is noted to be there said common appendant, which cannot be. *Vide 1 Roll. Abr. 401. Letter M. pl. 2. Fitz. Tres. 33. Br. Com. 14.*

So a man may prescribe to have common appurtenant to his freehold for all manner of cattle. 20 Aff. 8. *Bro. Com. 41.*

A man may prescribe that he and all those whose estate he hath in the manor of D. have used to have a fold-course, *scil.* a common of pasture for sheep not exceeding three hundred, in a field, *scil.* C. field, as appurtenant to the said manor; though he does not prescribe to have them levant and couchant upon the said manor, there being a certain number limited. *Mich. 11 Car. B. R. int' Day and Spooner.*

That a man may prescribe to have common appurtenant for his cattle not commonable; as hogs, goats, and such like. *Co. Lit. 122.*

A man may prescribe to have common appurtenant to his freehold for all manner of cattle, at every season of the year; adjudged. 25 Aff. 8. *Br. Com. 41.*

That a man may prescribe to have common appurtenant for hogs levant and couchant upon such land. *Mich. 5 Jac. per cur'.*

How Common Appurtenant may be used.

He that hath common appurtenant cannot agist the cattle of a stranger. 13 Ed. 3. 37.

* See p. 239.

But he may borrow sheep of another to compester his land, and with those he may use the common. 14 H. 6. Fitz. Tref. 33. Br. Com. 14.

That a man may use a common appurtenant to his manor with cattle that are for his household. *Ibid.* Vide 1 Roll. Abr. 401. Let. N. pl. 2, 3. Br. Com. 14.

But he cannot use the common with cattle that are to sell. *Ibid.*

Of Common in Gross.

Common appendant cannot be made common in gross, for this is for cattle levant upon the land, to which, &c. and therefore it cannot be severed without extinguishment. 9 E. 4. 39. 26 Hen. 8. 3 Cro. Car. 542. That it may not by grant be severed from the soil.

So common appurtenant for cattle levant and couchant upon the land, cannot be made in gross for the aforesaid cause. Nevil 384. 19 H. 6. 33. 6 Br. Com. 33. But that common appurtenant for a certain number of beasts may be granted over. Cro. Jac. 14. per cur' adjudged, that it could not by grant be severed from the land, because he had it only *sub modo*, viz. for beasts levant, &c.

If A. and all those whose estates he hath in the manor of D. have had time out of mind a fold-course, *scil.* common of pasture, for any number of sheep not exceeding 300, in a certain field, as appurtenant to the said manor, he may grant over this fold-course to another, and so make it in gross, because the common is for a certain number;

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ber; and by the prescription the sheep are not to be levant and couchant upon the manor: But it is a common for so many sheep appurtenant to the manor, which may be severed from a manor as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. *Mich. 11 Car. B. R. int' Day and Spooner, Cro. Car. 432. 1 Jon. 375. 1 Roll. Abr. 432. pl. 4. int' Mich. 6 Car. Rot. 183.*

But there the case was, whether it might be granted over with parcel of the manor, and so should be appurtenant to this parcel? And it is adjudged *in Banco*, that it should pass as appurtenant to this parcel; and so held *per cur'* in *B. R.*

That a man may prescribe to have it for all manner of cattle. *15 E. 4. 33.*

The grantee of common for a certain number of cattle cannot common with the cattle of a stranger. *18 E. 4. 14. b.*

If a lord licenses a stranger to put his cattle into the common, this shall be intended of commonable cattle only, and not of hogs. *2 Mod. 7.* But if the licence be for a particular time, it is otherwise. *Ibid.*

If in an action of trespass brought by a commoner against a stranger for putting his cattle into the common, whereby he could not have common in so large a manner; and the defendant pleads a licence from the lord to put his cattle there, but does not aver there is sufficient common left for the commoners, this is no good plea; though it may be objected, the plaintiff may reply thereunto, yet being the very gist of the action, the defendant should have pleaded thereunto: Adjudged *int' Smith and Feverel, 2 Mod. 6.*

But in an action against the lord, the plaintiff must particular shew the surcharge.

If a commoner have no cattle, he cannot agist the cattle of others to use the common. 45 E. 3. 25. b. Br. Com. 5. Br. Sess. 5. 22 Aff. 84. Br. Com. 40. Fitz. Aff. 228.

So he cannot command his tenants at will to use it with their cattle in his name. *Ibid.* ut *supra*.

But if he borrow other cattle to manure his land, he may use the common with them, for they are in a manner his cattle by borrowing; and the cattle which manure the land, of right ought to have common. 45 Ed. 3. 25. b. 22 Aff. 84, &c. ut *supra*.

If a man at all times have used common with his cattle couchant and levant in certain places, and not with other cattle; this is common appendant to this place, and not in gross. 22 Aff. 36. 13 Co. 66. Br. Com. 23.

If a man grant common to another for years, and do not declare in what place he shall have it, this is void. 9 H. 6. 36. Br. Grant 5.

If a man grants to another common *ubicunque averia sua ierint*, (wheresoever his cattle went) this is a good grant by averment, in what place his cattle fed at that time of the grant, before or after. 9 H. 6. 36. Br. Grant. 5. Fitz. Com. 2. Br. Com. 3. But without such averment this is no good grant. 9 H. 6. 36.

Again, if a man make such a grant as above, yet if the cattle of the grantor did never feed in any place before the grant, or at the time of the grant or after, the grantee shall have no benefit of the grant. *Ibid.* Br. Com. 4.

But

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But if he grants common in that manner, and after he occupies and manures 100 acres of land with his cattle, and after he becomes so poor that he hath no cattle, yet the grantee shall have the common in the 100 acres. *Ibid.*

So upon such a grant, if the grantor at the time of the grant or after, feeds his cattle at any place, the grantee may common there also. 9 H. 6. 36.

So upon such a grant of common, *ubicunque averia* of the grantor *ierint*, if the grantor put his cattle in his garden or in his corn, the grantee may put his cattle there also. *Ibid.*

But if there be such a grant, and the grantor dies, it is made a *quare*, if the grantee shall have common after his death? *Ibid.*

And if a man grants common to another for all his cattle throughout his manor, yet he cannot common in the garden of the grantor's parcel of the manor, but only in such places where a man of common right ought to common. *Ibid.* *Br. Com.*

But upon such a grant he may common in any reasonable part of the manor, though not waste or common before; adjudged. *Cro. Car.* 599. For by the grant there is no restraint to the waste or common.

Again, if a man grant common to another, *quandocunque averia sua ierint*, (whensoever his cattle should go) the grantee shall not have common but when the cattle of the grantor are in the common. 9 H. 6. 36. *Fitz. Com.* 2. *Br.* 3. *Br. Grant* 5. *Hob.* 40. cited and agreed. *Cro. Car.* 599. But objected, that the clause, *quandocunque*, &c. is void, because it restrains all the ef-

fect of the grant. *Resp. e contra*, for *modus & conventio*, &c. And it is not intendable the grantor will forbear to put in his own cattle to defraud the grantee of his common. *Vide 1 Rep. 87.*

If one grants common to another in his land, every year that it lies fresh; this is good, though it be at my will, whether he shall have any profits, for I may sow it. *17 E. 3. 34. b.*

And if *A.* grants common to *B.* in certain land for all his cattle, which shall be levant and couchant upon *Blackacre*, where *B.* hath nothing in *Blackacre*, so that it cannot be appurtenant; yet this shall not be a common in gross, because the intention and limitation of the grant is to cattle levant and couchant. Agreed int' *Gawen* and *Stacy*, *Trin. 15 Jac. B. R.*

That a man may grant to another common in one place for all manner of cattle, and in another place for ten beasts; and so the grantee may put the ten beasts in either of the two places. *17 E. 3. 34. b.*

Seisin of Common, how obtained, &c.

A *tortious user* of common cannot put one in seisin. *45 E. 3. 25. b. Br. Com. 5. Br. Seisin 5. 22 Aff. 84. Br. Com. 40. Br. Seisin 36. Fitz. Aff. 228.*

As a commoner cannot get seisin by cattle which he agists, for such user is not lawful; so he cannot gain seisin by the user of his tenants at will being his servants with their cattle, by his command, in his name, for their user with their cattle is tortious. *Ibid. ut supra.*

But.

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But if a commoner hath no cattle, and so takes the cattle of another, and the tertenant delivers seisin to the commoner, and is present when the cattle are put in, and he assents to the user and putting in, or commands him so to do; this is good seisin. 45 E. 3. 26. 22 Aff. 84. Br. Seisin 36.

So if the commoner hath no cattle, he may take seisin by the cattle of another, and chase them back presently; for the continuance is tortious, and this is said to be a good seisin. 45 E. 3. 26. Br. Seisin 5. Br. Com. 5. But Br. Com. 51. it is made a *quare*; and this seems not to be law, for the putting them in without continuance is tortious. 22 Aff. 24. Br. Com. 40. Br. Seisin 36. Fitz. 228.

If a man hath common *sans* number, if he hath been seised of this with cattle, without any certain number, as 20, 30 or 40; this is said to be a good seisin. 11 H. 6. 23.

That if a man recovers a common, and the sheriff upon a writ of seisin comes to the place, and by parol delivers to him seisin of the common; this is a good seisin of the common to have an assize. 22 Aff. 84. Br. Seisin 36. Fitz. Assize 228.

Where the seisin of the father is not sufficient for the heir. 45 E. 3. 25. Br. Seisin 5. 22 Aff. 84. Br. Seisin 36. Fitz. Ass. 228.

But the seisin of the lessee for years of a common is sufficient for him in reversion. 45 E. 3. 26. 22 Aff. 84. Fitz. Ass. 228. Br. Seisin 36.

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What

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What things a commoner may do. See Bar. Rep. 264, &c.

For the interest and power of a commoner, and the general learning thereof; *vide* Bridg. 10, 11. Godb. 123, 124. 2 Leon. 201, 202.

Where he may make one or more gaps to put in his cattle, if the common be inclosed. *Vide* Goldf. 117. Lit. Rep. 38. 2 Inst. 81.

May throw down the hedges. 2 Mod. 65, 66. 1 Brownl. 228.

If the lord makes a pond in the common, the commoners may let the water out. 1 Brownl. 288.

If the lord of a common makes cony-borrows in the common, and stores them with conies; though he has no warren, yet the commoners cannot justify the killing the conies, that they may not increase to the prejudice of the common. Adjudged int' *Hodson and Griffel*, Mich. 5 Jac. B. R. *Vide* Godb. 123, 124. 2 Bulst. 116. Yelv. 105. Cro. Eliz. 876. Cro. Jac. 229, 230. 1 Brownl. 227. 2 Leon. 201. 4 Leon. 7.

Again, if the lord of a common makes cony-burrows in the common, and stores them with conies, by which the commoners cannot have sufficient common; yet the commoners cannot justify the killing the conies, but ought to bring their assize or action against the lord, for they cannot be their own judges: *Sed dubitatur*. So *Bridgman* 9, 10, 11. *Dubitatur*, Whether a commoner may prescribe to kill the conies, so often as the common had been oppressed. *Vide* Cro. Jac. 195. and

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and *Yelv.* 104, 105. where the case of not killing is said to be adjudged. So *Godh.* 123. *Cony's* case. So 2 *Lein.* 201, 202. and 4 *Lein.* 7. adjudged, though it should be admitted the commoner hath no other remedy. *Cro. Jac.* 229, 230.

But it seems every one of the copyhold commoners, by prescription in the wastes of the lord, (if the lord stores the wastes with conies) may have an action of the case against the lord, averring, that by this his common is impaired. 1 *Roll. Abr.* 106. *Pl.* 19. *Ibid.* 405. *Pl.* 2.

And that an action lies, notwithstanding the king grants to the lord a free warren there. 1 *Jon.* 12. *Winch.* 16. *Palm.* 319. And accordingly, *Yelv.* 143. it was adjudged in an action by the heir of the commoner, for the continuance in his time. *Vide Cro. Jac.* 195. *Yelv.* 104, 105, &c. *Sed vide 1 Lutw.* 108.

Again it is said, that if the sheep of the commoners are killed, by falling into the said coney-burrows so made by the lord; yet they cannot justify the digging of the land, and stopping them for the cause aforesaid. *Trin.* 11 *Jac. B. R.* *sed dubitatur.* 2 *Bull.* 115, 116. adjudged. *Cro. Jac.* 229, 230.

If *J. S.* hath land adjoining to the land of *J. D.* in which *J. N.* hath common of pasture, and *J. S.* makes coney-burrows in his land, and stores them with conies, which come into the land of *J. D.* *J. N.* who hath the common of pasture, cannot there kill the conies, because he hath nothing to do there, but to take the grass with the mouth of his cattle. Adjudged, *Mich.*

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43 & 44 *El. B. R. int' Bellows & Loughdon. Vide*
1 Roll. Abr. 90. pl. 9. Cro. El. 876. The ac-
tion being brought by *J. D.* adjudged; for the
coney is a beast of warren, and profitable as deer
are, and not to be compared to vermin. *Owen*
114. *Cro. Jac. 195. Yelv. 105. 2 Bulst. 116.*
1 Lutw. 108.

Mich. 10 Car. adjudged *int' Eversby and Wil-*
kinson in B. R. Such a commoner brought an ac-
tion upon the case against *J. S.* who, without
any lawful grant or prescription, had stored the
land adjoining with conies, by which the co-
nies came into the land where he had common,
whereby he lost his common; and adjudged that
the action does not lie, and a judgment given in
Banco, reversed accordingly in this case in a writ
of error; and the court gave the reason, because
here the commoner may kill the conies. *Vide Cro.*
Car. 387. 1 Roll. Abr. 90. contra 1 Jones 356.
same case adjudged, and the judgment reversed
accordingly.

A commoner may justify the taking the cat-
tle of a stranger *damage-feasant* upon the com-
mon in his own name, for the interest which
he has in the common. 15 *H. 7. 2. b. 11.*
13. *b. 14 H. 7. 3. b. 9 Co. Mary's case, 112.*
b. F. N. B. 128. 10 Ed. 4. 4. 15 H. 7.
13. *b. agreed.*

But he can have no action, unless laid, *per quod*
his common was impaired. *Kerlv. 47. a.* But
for this *vide 2 Co. 112, 113. 1 Brownl. 197. 2*
Brownl. 55. 1 Roll. 89. pl. 8. Br. Com. 35.
39. *Br. Justification 15.*

And if a copyholder, by the custom of a manor,
has used to have common for all cattle levant
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and couchant upon his customary tenement, in a certain place, parcel of the manor, and a stranger digs turfs there; and carries them away, by which his common is impaired, an action upon the case lies, declaring, That the defendant dug so many turfs there, and them with his horses and carts (the grass then and there growing treading down with his feet in walking) from the place aforesaid unjustly did take and carry away, whereby the plaintiff could not have his common for his cattle in so beneficial a manner as before he had; and this is said to be a good declaration. Though the commoner cannot have any damage for the taking and carrying away of the turf, yet the coming upon the land with his horses and carts to carry them, is a prejudice to the common. And there, *per quod* his common is impaired, is the cause of the action, and the carrying and taking them is a means of the impairing thereof. *Mich. 9 Car. inter Teary and Godier*, adjudged: This being moved in arrest of judgment upon such a declaration, the damages being intire. *Holland and Lovel* a like point, 2 *Brownl.* 148. 9 *Co.* 113. *Co. Ent.* 9. pl. 8. 14. pl. 12. *Godb.* 343. 2 *Roll. Rep.* 308. *ad-journatur*.

That trespass lies against a stranger for suffering his horses, &c. to eat, &c. the grass, whereby he could not have his common in so beneficial a manner. 9 *Co.* 11. 2 *Brownl.* 55. *Jenks Rep.* 144. by which book, though the old opinions are otherwise; yet an action will lie, else the commoner may be without remedy; for the cattle may be gone before he can take them *damage-feasant*. But he shall not have an action
for

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for every petit trespass; but for such only, whereby he could not have his common in such a beneficial manner. 9 Co. 113. 1 Brownl. 197. Br. Com. 24. Keilw. 47. 1 Roll. Abr. 405. pl. 5.

If there be a custom, that a close ought to lie fresh and hained every second year till *Lady-day*, after the corn cut and carried away, and J. S. hath used time out of mind to have common in the said close after *Lady-day*, till it is sowed again with corn, for his cattle levant and couchant upon a certain tenement, as appurtenant thereto; in this case, if the lord of the soil of the said close puts in his cattle in the said close against the custom, when it ought to lie fresh and hained; by the custom, the said J. S. though he be but a commoner, yet he may take the cattle of the lord there *damage-feeasant*, and justify it in an action of trespass brought against him by the lord of the close where he took the cattle; for it will be the worse common, if the lord may eat the grass before the common is to be taken by the custom. Mich. 14 Car. inter Trulock and White, adjudged; this being moved in arrest of judgment.

So where the lord by custom is stinted to a certain number of cattle, and yet he puts in more. Yelv. 129. Vide Cro. Jac. 208. 1 Brown. 187, 188. In which case some of the judges doubted, whether, as the stinting the lord was gained by custom, a custom and usage to distrain ought not to be alleged; but how far the lord may be restrained to a certain stint, vide 2 Roll. Abr. 267. *Inter L.*

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It is said to be a general rule, that in other cases the commoners cannot distrain or chase but the cattle of the lord or tertenant *damage-feasant*; for which see 2 *Leon.* 203. *Yelv.* 104, 105, 129. *Cro. Jac.* 208. 1 *Brownl.* 187, 188. *Godb.* 182.

A commoner in an action of trespass cannot justify his coming there, with an intent to put in his cattle there, if he does not put them in. Adjudged, *Pasch.* 17 *Jac. Br. R. int' Sir H. Spelman* and *Hermitage*.

But the commoner may justify his coming to see if the pasture in it be fit to receive his cattle. *Pasch.* 17 *Jac. B. R.*

If *A.* hath common of estovers in the woods of *J. S.* and *J. S.* cuts part or all the wood; yet *A.* cannot take any part of this which is cut, but shall be put to an assize or case, as his estate is. *Pasch.* 17 *Jac. B. R. ut supra.* *Cro. Eliz.* 826. *Cro. Jac.* 257. 1 *Roll. Abr.* 567. *Pla.* 3. *Yel.* 188. 1 *Brownl.* 197, 200. 1 *Bulst.* 93, 94. *Vide* 9 *Co.* 112. 1 *Brownl.* 197. 1 *Roll. Abr.* 108. *Pl.* 12. 5 *Co.* 25.

So if one grants to me 1000 cords of wood to be taken at my election, and the grantor or stranger cuts down all or part of the wood, I can take no part of that which is cut down. 5 *Co.* 25. *Sir Thomas Palmer's case.* *Cro. Eliz.* 820. *Noy* 31. *Moor* 692. *Pl.* 955. *Yelv.* 188.

But if a man claims all the thorns, &c. growing in such a place, he may take them though cut down by another. *Cro. Jac.* 257. *Yelv.* 188. 1 *Brownl.* 219, 220. 1 *Bulst.* 93, 94.

If a common every year in a flood is surrounded with water, yet the commoner cannot make a trench in the soil to avoid the water, because

cause he has nothing to do with the soil, but only to take the grafs with the mouth of the cattle. 12 H. 8. 2. 13 H. 8. 15. D. 36 H. 8. 36. h. 39. *Vide 2 Bulst.* 116. *Bridgman* 10. *Godb.* 52.

So the commoner cannot cut bushes, fern, &c. which impair the common, (*Bridgm.* 10.) unless it be by special prescription; for if he makes any thing *de novo* in the land, he is a trespasser, but he may amend and reform a thing abused. And therefore if the land be full of mole-hills, he may dig them down. 2 *Brownl.* 228. So if there be holes dug in the common to the damage of the land, they may put again the earth dug into its place.

Approvement of Common, concerning it.

By the order of the common-law there could be no approvement, because the common issued out of the whole waste. 2 *Inst.* 85.

By the common law, the lord might approve against any that had common appendant, but not against a commoner by grant. 2 *Inst.* 474. 1 *Roll. Rep.* 365.

By the statute of *Merton*, 20 H. 3. c. 4. because great men having enfeoffed others of small tenements in their great manors, complained they could not make their profit of the residue of their manors, as waste, woods and pastures; it was provided, when such feoffees bring an assise for their common of pasture, and it is alledged they have not sufficient pasture belonging to their tenements, ingress or regress, the truth shall be inquired by the assise; and if found they have not sufficient,

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sufficient, &c. they shall recover seisin by the view of the inquest, and by their discretion shall have sufficient, &c. but if found they have sufficient, &c. the other shall make the profit of the residue, and be quit of the assise.

See the explanation of this statute, 2 *Inst.* 85, 89. *Vaugh.* 257.

This statute extends only to enable the lord to approve against his tenants, (i. e. to enclose part of the waste, woods and pastures, for himself, and discharge it from being common) if he leaves common sufficient, &c. *Vide* 2 *Inst.* 85. This may be tried in an action of trespass. 2 *Inst.* 88.

Godb. 117. But,

If the lord inclose any part, and leave not sufficient common in the residue, the commoner may break down the whole inclosure. 2 *Inst.* 88.

It extends not to common of piscary, turbary, estovers, &c. 2 *Inst.* 87.

It extends not to common in gross. *Idem.* 86.

When it is found they have not sufficient, the inquest shall find what is sufficient, that the lord may approve the residue. 2 *Inst.* 88. And tho' after it should prove insufficient, the improvement continues. *Idem* 87, 88. See after.

The improvement is to be made by inclosure, and not by digging for coals, &c. 2 *Inst.* 87. 1 *Sid.* 106.

And if the lord make a feoffment of part, his feoffee may inclose; for the feoffment in its nature was an improvement. 2 *Inst.* 17.

And thereby it is discharged of the common; and if the tenant purchase it, his common is not extinguished. *Ibid.*

But

But the lord cannot improve the whole, leaving them sufficient in other lands. 2 Co. 25. b.

By the statute of *Westm. 2.* (13 Ed. 1.) c. 46. the statute of *Merton* shall not only bind the lord's tenants but neighbours also, and such as claim common of pasture, as appendant or appurtenant to their tenements, but not such as claim common by special grant or feoffment, for a certain number, or otherwise.

A neighbour is bound, though he dwell in another town, so the town and common adjoin. 2 *Inst.* 474.

And if the lord hath common in the tenant's grounds, the tenant may improve within this act. *Ibid.* And yet there seems as if the common of the lord was reserved upon the first feoffment. *Ibid.*

That by occasion of a windmill, sheep-cote, dairy, enlarging of a court necessary for curtilage, none shall be grieved by assise of *novel disseisin* for common of pasture. *Vide* same statute.

Note; It is said, these above are but for examples; for the lord may erect an house for the habitation of a beast-keeper. 1 *Inst.* 476. 1 *Lev.* 62. And it must be shewn that it was done for his necessary residence. *Vide* 1 *Sid.* 97. 1 *Keb.* 283, 314. and whether of a necessary curtilage it should be an ancient one, *dubitatur.*

And none in such cases shall be grieved, though there be not sufficient of common left. 1 *Inst.* 476. 1 *Lev.* 62.

And where any having right to approve, levies dyke or hedge, and it is thrown down in the night or other season, &c. and it cannot be known by verdict of assise or jury by whom, and the men

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of the towns near will not indict such as are guilty of the fact; the towns near adjoining shall be distrained to levy the hedge or dyke at their own costs, and to yield damages.

It is said, that the cutting down of timber is not within the act. *T. Raym.* 487.

That if the prostration in the day or night was before the face of the owners, or so publick, that the offenders may be known; it is not within the act. *1 Lrv.* 101. a traverse taken accordingly.

For the inquisition and other proceedings upon this act, *vide Cro. Car.* 280, 440, 580. *1 Jon.* 307. *1 Sid.* 107, 212. *1 Lev.* 108. *1 Mod.* 66.

And no time being appointed for the indictments, it is said it shall be intended within a year and a day. *2 Inst.* 476. *1 Roll. Rep.* 365. and *per Cro. Car.* 440. a convenient time.

That the lord shall bring his action upon this statute against the towns bordering round about the town where the fact was done; and judgment shall be given, That they shall at their proper cost make the ditch, &c. *2 Inst.* 477. *1 Roll. Rep.* 365.

And the above statute of *West. 2.* or *13 Ed. 1. c. 46.* further enacts, That if any upon just title of apprevement do make a ditch or hedge, for that purpose, which is afterwards thrown down by persons unknown, the towns adjoining may be distrained, to make such ditch or hedge at their own costs. [See *1 Geo. 1. c. 48.* *6 Geo. 1. c. 16.* See also *2 Inst.* 474, &c.]

And *per 3 Ed. 6. c. 3.* the statutes of *Merion* and *Westminster* are confirmed, and treble damages given

given to the commoners that recover in assise against the lord.

See the *Stat. 29 Geo. 2. c. 36.* by which proprietors of wastes, woods and pastures, and persons having a right of common of pasture thereon, may, by consent, inclose any part thereof for planting or preserving of timber or underwood, &c.

See also the *Stat. 31 Geo. 2. c. 41.* made to amend and render more effectual the said act of 29 *Geo. 2. c. 36.*

Admeasurement of Common.

Concerning the admeasurement of common, and where it lies, *vide F. N. B. 125.*

It lies by one commoner against another; but if the tenant surcharges the common, the lord shall not have a writ of admeasurement against the tenant. *Ibid. A. D.*

By 2 *Inst. 86.* It lies only for and against such as have common appendant. But 2. & *vide F. N. B. 125. D. 1. Roll. Rep. 365.*

Upon the suit of one commoner against another, it is said all the commoners shall be admeasured. *F. N. B. 125. B.*

So if the lord surcharge the common, or approve without leaving sufficient, the tenant shall not have a writ of admeasurement against him, but an assise. *F. N. B. 125. D.*

That no writ of admeasurement lies against a commoner *sans number*, nor shall his common be admeasured. *Ibid.* But the tertenant may distrain his cattle. 1 *Saund. 345.*

Vide

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Vide 1 *Lutw.* 98. That one may prescribe for common in a forest for sheep in the fence-month, but may not prescribe for goats. *Idem.* 81.

An agreement for inclosing the common, and sharing it among the parties, decreed to be performed; but decreed also, That if there were any persons who had interest in the said common, who were not parties to that agreement, they should not be prejudiced thereby, but that it should not be in the power of one or two wilful persons to oppose the publick good. *Cases in Chancery*, 1 *Par. f.* 48, *Tiverton* against *Collier*.

Where one has a right of common in a common field, from the time the grain is carried off, until it is sown again; the sowing of a small parcel of such field shall not oust the commoner from taking his common in the residue of the field. *Mich. 8 Jac. 1. B. R. Trulick and Riggesby, Yelv.* 185.

Vide a custom of a manor for the reeve to make a drift of the cattle at any time by the appointment of the steward. *Lord Raym.* 1186, *Follet v. Freak and others*.

C H A P.

C H A P. VIII.

Several Observations upon the Statute 29 Car. 2. which was made to prevent Frauds and Perjuries, and relates to Bargains in buying and selling Goods and Chattels.

FIRST, it is to be observed, That no leases, estates or interest, either of freehold or terms of years; or any uncertain interest, (not being copyhold or customary interest) of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the parties so assigning, &c. or their agents thereunto lawfully authorized by writing, or by act or operation of law.

Also, that no contract for the sale of any goods, wares, merchandizes, for the price of ten pounds sterling, or upwards, shall be allowed to be good;

Except the buyer shall accept part of the goods so sold, or actually receive the same;

Or give something in earnest to bind the bargain, or in part of payment;

Or else that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contracts, or their agents thereunto lawfully authorized:

And if so done, the action for the money may be brought any time within six years; (or after
six

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six years, if an original writ be sued out within six years.)

Also, That no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof :

Nor whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate :

Or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person :

Or to charge any person upon any agreement made upon consideration of marriage :

Or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them :

Unless the agreement, upon which such actions shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith ; or some other person thereunto by him lawfully authorized.

So that if the agreement be for goods, wares or merchandize, under the price of ten pounds ; yet if by that agreement they be not to be delivered within a year.

That agreement seems to be void, unless put in writing, and signed by the party to be charged thereby.

And though earnest be given upon such an agreement, not to be performed within a year, it seems it will not help. *Proc. in Chan.* 560.

Also if the contract be for goods, &c. above ten pounds ; and though earnest be given, or part of the goods received ; yet if the remainder
be

be by such contract to be delivered after a year, this contract (unless put in writing, and signed) it seems will not bind for the remainder. *Precedent in Chan.* 560.

And so if the agreement or promise be to do any other thing or things that are not to be performed in a year's time from the making, it will not be binding unless such note or memorandum be made.

But if no such day is set, or the time is uncertain, as to pay so much at the day of death, &c. it is otherwise; for it does not appear but that might happen within a year. Agreed by all the judges on a case put by *Triby* chief justice. *Skin.* 326. *pl.* 4. 353. *pl.* 1.

Again, if any person promises to pay the debt of another person, or to answer for the default or miscarriage of another person:

As if he should say, Trouble not such a man, and I will pay you the debt he owes you:

Or, Trust such an one; and if he don't pay you, I will: *Lord Raym.* 224. 2 *Lord Raym.* 1085, 1087. See 12 *Mod.* 250.

Or, if he don't do such a thing, I will make you satisfaction. See *Bac Abr.* 75, 76.

These promises, as aforesaid, without a note or memorandum under hand, will signify nothing, tho' it was at his request, and though you may alledge and shew a good consideration for it.

Also, if the agreement be upon some consideration of marriage;

As, I will give you so much if you will marry my daughter or kinswoman, &c.

Here the marriage is made the consideration, and so void without writing.

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But to say, I will give so much for such a horse at the day of my marriage; this is otherwise, and good without note; for the horse, in this case, is the consideration of the promise.

But the clause relating to marriage, does not extend to a promise to marry, as well as to the payment of marriage portions, and therefore a parol promise of marriage is good. *Skin. 196. Lord Raym. 387. 2 Eq. Cas. Abr. 248. Stra. 34.*

And if it be about the sale of lands, tenements or hereditaments, or any interest therein, it must be put in writing under hand, as aforesaid.

As if a man promise to sell you such a house, piece of land, or the like;

Or to make a lease for years, or life, of any lands or tenements; it will not bind without writing, &c.

And lastly not to charge any executor or administrator upon any special promise to answer damages, &c.

As if an executor or administrator says to one that is about to sue him for money owing by the testator, &c. Forbear your suit, and I will pay your debt. This promise will not bind to make him answer damages of his own estate, unless it be put in writing under hand, &c. See *Bac. Abr. 75.*

1. Therefore every agreement not to be performed within a year;

2. Every agreement with an executor concerning the testator's estate;

3. Every agreement to pay the debt, &c. of another person;

4. Every agreement where marriage is the chief consideration;

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5. Every

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5. Every agreement concerning the sale of lands, &c. must be put in writing, and signed by the party to be charged.

So that in the particulars above named, it is absolutely necessary that there be some note or memorandum to make good such contract, promises and agreements.

Note. That by *Stat. 7 Jac. 1. 12.* None keeping a shop book, his executors or administrators, shall be allowed to give it in * evidence for wares or work above one year before the action brought, unless they have obtained a bond or bill for the debt, or brought an action for the money within one year next after the wares delivered, or work done.

But this act is not to hold place between merchant and merchant, tradesman and tradesman, or merchant and tradesman, for any thing falling within the compass of their mutual trades and merchandize.

Concerning Notes promising Payment.

It may here be proper to observe, that by the † statute 3 & 4 *Ann. c. 9.* all notes signed by any

* This act shews very great ignorance of the common law, though one should imagine that no one but a lawyer could have proposed the bill, for a tradesman's shop book never could be allowed to be evidence for him in any court of law, if no such declaratory statute had passed. *Bar. Observ. on Stat. 2d Edit. 421. in Notes.*

† Perpetuated by *Stat. 7 Ann. c. 25. s. 3.*

person,

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person, &c. whereby any such person, &c. shall promise to pay another person, &c. or order, or bearer, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c. to whom the same is made payable.

And also, such note payable to such person, &c. or order, shall be assignable over, in manner as inland bills of exchange are. And the person to whom such money is payable may maintain an action for the same, as they might upon such bill of exchange. And the person, &c. to whom such note so payable, or order, is assigned or indorsed, may maintain an action against the person, &c. who signed, or any who indorsed the same, as in cases of inland bills, and recover damages and costs of suit: And in case of nonsuit or verdict against the plaintiff, the defendant to recover costs against the plaintiff.

See more in the statute concerning drawing, accepting and protesting inland bills; and *Levi's Rep.* 536, to 542.

Stat. 15 Geo. 3. chap. 51. after reciting, that various notes, bills of exchange, and draughts for money for very small sums, had for some time past been circulated or negotiated in lieu of cash, in *England*, to the great prejudice of trade and public credit; and many of such bills and drafts being payable under certain terms and restrictions, which the poorer sort of manufacturers, artificers, labourers, and others could not comply with, without being subject to great extortion and abuse, enacts by

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Sect. 1. That all notes, bills, drafts, or undertakings, being negotiable for payment of any money, less than 20s. shall be void.

By *Sect. 2.* If any person, by any means whatever, publish or negotiate any such notes, &c. or on which less than 20s. shall be due, he shall pay 20*l.* or not less than 5*l.*

Stat. 17 Geo. 3. chap. 30. after reciting the above act of 15 *Geo. 3. chap. 51.* and that the same had been attended with very salutary effects; and that in case the provisions thereof were extended to a further sum, the good purposes of it would be further advanced, enacts by

Sect. 1. That all notes, &c. negotiable for 20*s.* or above, and less than 5*l.* shall remain undischarged, and made within *England*, after 1 *Jan. 1778.* shall specify the names and places of abode of the respective persons, to whom, or to whose order, the same shall be made payable, and shall be dated before or when drawn, and not on any subsequent day, and be payable within 21 days after their date, and not negotiable after time of payment; and every indorsement shall be before time of payment, and be dated at or not before the time of making thereof; and shall specify the name and place of abode of the person, to whom, or to whose order, the money is to be paid; and that the signing of every such note, &c. and indorsement shall be attested by a witness, and drawn as follows;

Ludi,

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Leeds, 20 Nov. 1777.

TWENTY days after date, I promise to pay
James Hatley, of Fleet Street, London,
his order, the sum of four pounds and ten
shillings, for value received by
£ 4. 10. 0

Charles Jebb.

Witness

Richard Bunn.

And the indorsement *toties quoties*.

Norwich, 31 May, 1778.

TWENTY one days after date pay to John Trott
of Fetter Lane, London, or his order, the sum
of two pounds and two shillings, value received, as
advised by

William Hole.

To Matthew Wilks, of Shoreditch in the county
of Middlesex.

Witness

Mary Munt.

And the indorsement *toties quoties*.

15 March, 1777.

PAY the Contents to Benjamin Hopkins, of
Guildhall, London, or his order,

John Trott.

Witness

Christopher Cowper.

And that all notes, &c. as before or in which 20*s.* or above, and less than 5*l.* shall be undischarged; and issued within *England*, at the time aforesaid, in any other manner, and also every indorsement shall be void.

By *Seet. 2.* Publishing or negotiating in *England*, any note, &c. of or under the above value, made in any other manner than hereby permitted; and also negotiating such last mentioned note, &c. after the time aforesaid, is prohibited under the like penalties and forfeitures, and to be recovered and applied, as by 15 *Geo. 3. chap. 51. sect. 3.* &c. is directed (1).

By *Seet. 2.* That all notes, &c. issued before 1 *Jan. 1778.* to be payable within *England* on demand; and recoverable as directed by act with respect to notes, &c. issued before 24 *June, 1775.* and all matters contained in 15 *Geo. 3.* are to be in force in *England* as to notes, &c. issued after 1 *Jan. 1778.* and previous thereto.

By *Seet. 3.* That both acts to continue not only for residue of five years, in former act, but also for further term of five years.

(1) Which is by summary proceedings before a justice of peace.

C H A P. IX.

Several necessary Matters relating to Farmers, and such as keep and feed Sheep, and other Beasts; and also relating to Actions for Nuisances done by one Tenant to another, &c.

BY 25 H. 8. 13. None shall receive or take in farm for term of life, years, or at will, by indenture, copy of court-roll, or otherwise, any more houses or tenements of husbandry, whereunto any lands are belonging, in town, village, hamlet or tithing within this realm, above the number of two such holds or tenements; and they are to be situate in the same parish where he dwells, on pain to forfeit to the king and informer three shillings and fourpence for every week he takes the profits of them.

By Stat. 21 H. 8. 13. No spiritual person shall take to farm to himself (or to any other for his use) any lands or other hereditaments for life, years, or at will; on pain to forfeit ten pounds for every month he so continues the same, to be divided betwixt the king and the prosecutor.

But this act not to extend to any spiritual person, for taking any archbishopricks, bishopricks, abbies, priories, or collegiate, cathedral, or conventual churches; nor to any such person who shall tender or make any traverse upon any office concerning his freehold.

The said act also provides, That no spiritual person shall take in farm any parsonage or vicarage; on pain to forfeit 40*s.* for every week that he, or any other for his use, so occupies the same, and also ten times the value of the profit or rent that he makes thereof; both which forfeitures are to be divided betwixt the king and the prosecutor.
See after.

Also by 25 *H. 8.* 13. None shall keep in his own possession, at any one time, above two thousand sheep; on pain to forfeit for every sheep above that number 3*s.* 4*d.* to be prosecuted for a subject within one year, and for the king within three; but here lambs shall not be accounted as sheep till *Midsummer* twelve month after their fall.

And if any happen to have more sheep than two thousand, by reason of any executorship or marriage, they shall not be impeached by this law, so that in one year after they put off so many, that at the end of the year they may not have above two thousand: Neither shall a child, (during his nonage) nor any person for him, be endamaged by this act, which child shall have by legacy above two thousand sheep given him.

But every temporal subject may keep (upon his own demesne lands) as many sheep as he will, or for the maintenance of his house, above the number of two thousand, notwithstanding this act.

A thousand sheep meant by this statute shall be accounted after the rate of six score to the hundred.

Justices of the peace have power to hear and determine the offences committed against this act, but shall not take a less fine than is limited by the same.

And

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And by the statute of 2 & 3 P. & M. c. 3. Whosoever shall feed above one hundred and twenty shorn sheep for the most part of the year upon his grounds, which be several and apt for milch kine, and not commonable, and shall not for every sixty sheep keep one milch cow; and moreover, for sixscore sheep yearly rear one calf during the time of keeping such sheep, shall forfeit to the queen and informer for every cow not kept, for every month 20s. and as much for every calf not reared.

Also, whosoever shall feed upon his several pastures, above twenty oxen, ronts, steers, scrubs, heifers, kine, and shall not for every ten beasts keep one milch cow, and for every two kine wean and rear up yearly one calf, (except it die) shall forfeit as before; the suit to be commenced within one year after the offence committed, and not to bind such as keep sheep, or feed beasts for their own provision. Justices in their sessions have power to hear and determine the breach of this statute.

By Stat. 27 H. 8. c. 6. Every one having inheritance or freehold in a park kept for deer, which is a mile about, or his farmer, shall keep two mares, apt and able to bear foals, each of them being thirteen hands high, from the lowest part of the hoof to the highest part of the shoulder, and each containing four inches; on pain of 40s. for every month they want them; and if the park be four miles about, they shall keep four mares upon the like pain.

If any of the mares die, they have three months given them to provide another, without danger of incurring the said penalty.

They shall not suffer their mares to be leapt by any stone-horse under fourteen hands high, on pain of 40s.

The said forfeitures are to be divided between the king and the prosecutor.

This act not to extend to *Westmorland, Cumberland, Northumberland*, nor bishoprick of *Durham*; nor to the parts wherein the inhabitants of the town next adjoining have common.

Spiritual persons may sell the increase and breed of their mares, notwithstanding this act.

And by 32 H. 8. c. 13. (in order to preserve the breeding of strong horses.) no stone-horse above two years old, and under fifteen hands, every hand four inches, to be put into forests where mares are kept; upon pain of forfeiting the horse.

Several Actions on the Case, necessary to be known by all Farmers, &c.

If one disturb another in his way to a house or land, by stopping or straitening of it, or stop or turn his water coming to his house, mill or ground, or the light to his house, or if one stop a ditch or river, or set up flood-gates, so as to make the water overflow and drown his ground adjoining, he may have an action of the case against him for it. *See after, highways, private ways, &c.*

But if a man stop or turn water only to amend his bank or mills, having by custom or use done it, this is justifiable. 4 Co. 86. 1 Co. 50. Lit. Rep. 267. 1 Vent. 274. 2 Vent. 138, 185, 288, &c.

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If one stop a stream of water, and put it out of its old course, and by that means my ground is drowned, I may have an action. *New Book of Entries, f. 18. Dyer 248.*

Where I have an ancient mill, and an ancient water-course to maintain it, if any man shall divert it, that I cannot have the use of it to my mill as formerly, I may have an action on the case against him. *Style's Rep. 370. 4 Co. 86. Vide 3 Lev. 133. 1 Mod. Rep. 48.*

If one disturb me in my walk, fold or foldage, watering-place, church-way or high-way, stile or seat in the church, or any other profit appendant, which I have had time out of mind, as belonging to my ancient house by prescription, I may have an action. *4 Co. 32, 89. 5 Co. 1, 76. 12 Co. 105. Bulst. 47, 69. 2 Bulst. 14, 129. Bendl. 89.*

Action lies for not folding sheep on the plaintiff's land, whereby the plaintiff lost the benefit of foldage. *2 Vent. 138.*

If one disturb me in my common, that I cannot have it as liberally as formerly I have had, an action lies. *Style's Rep. 164. 1 Cro. 390. Heth. 143.*

If one dig a pit in a place where I have common, by occasion whereof my beast there going falls into it, and is hurt, I may have an action. *2 Cro. 158. 1 Vent. 195.*

If one inclose land which should lie open in a manor, by which the commoners have not enough for to common their cattle, or eat up the common so much that the commoners have not enough; in this case it is said every commoner may have his action against him. *F. N. B. 145. 9 Co. 113.*

If the inhabitants of a parish have a watering-place by prescription, and be disturbed in it, each of them (as it seems) may have an action for such disturbance. *27 H. 8. 27. Finch's Ley 177.*

If the lessor out me that am an executor of the lessee for years, or my executors after me, of the term, each may have an action on the case, or an *ejectioe firmæ*. *4 Co. 94.*

If the lessee keep out his lessor, coming to view his house; if any waste be done, the lessor may have an action of waste against him. *2 Cro. 478.*

If a lessee for life make a lease for years, and the lessee for years commits waste, for which the lessee for life is punished; in this case he may have an action against the lessee for years, and recover as much as the lessor doth or may recover of him. *Pasch. 38 Eliz. B. R. Gemie's case.*

So if the lessee for years of a house lease it for part of the time, and that time expire, and the lessee continue in full possession, and pull down part of the house, the first lessee may have an action of the case against him. *Trin. 6 Car. 1. B. R.*

If my lessor that is bound by law to repair my house, or to pay subsidies or the like, neglect it, and I suffer thereby, I may have an action on the case against him. *Dyer 36. pl. 37. 21 H. 7. 12.*

So the lessor may have this action against his tenant at will, for voluntary waste committed by him; but not for negligent or permissive waste. *5 Co. 13. Dyer 121. 14 H. 8. 12.* and therefore it has been adjudged, That where a tenant at will suffered the house to be burnt by the negligent custody of his fire, this action would not lie against him. *Cudlip and Rundle, Trin. 2 W. & M. Rot. 646. Carth. 203.*

But

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But an action on the case lies against tenant by *slegit*, who holds over, or cuts trees after the money tendered. 21 E. 3. 16.

If the lord cut down the copyholder's trees without his leave, (or else a special custom of the manor to enable him to it) the copyholder may have case against the lord for it. *Mich. 3 Jac. B. R. Crofs and Abbot*; and *Trin. 17 Jac.* by justice *Haughton*, and this notwithstanding he leaves the loppings of them.

Also, if the lord cut down any tree of his tenant that is to have the lops, and take it away, case lieth. 1 *Brownl.* 97, 213.

If the lord cut down all the copyholder's trees, and not leave him fire-wood, &c. tenant may have case against him. *Brownl. ibid.* 141, 197, 298. 2 *Brownl.* 57, 331.

If the tenant refuses to grind at the lord's mill, as hath been used time out of mind, action lieth against him. 1 *Vent.* 167. 2 *Vent.* 292. 1 *Saund.* 215.

For voluntary firing his house, whereby my house is burnt, *vide Bendl.* 153. and 3 *Lev.* 359.

See the acts at the end of this treatise.

If one be time out of mind to repair a hedge between my close and his, and he let it be unrepaired, that my cattle go into his or other mens grounds, or other mens cattle go into my ground, by reason of which I have damage, I may have action of the case for it. 2 *Cra.* 699. 20 *Jac. B. R.* See 1 *Vent.* 264, 274, 275.

So if one be to repair or scour a ditch, and do it not, by which my land is drowned, or I have any special damage, case lieth against him. *F. N. B.* 93 G. 11 *H.* 4. 28. Action, &c. 30, 34, 36.

If

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If one be to repair a wall, or bank of a river, and do it not, or doth it not sufficiently, whereby my land is drowned, I may have an action *sur le Case*.

But in these cases, and such like, I must aver some special damage to me, by the not doing thereof. *Trin. 20 Jac. B. R. 2 Bulst. 280.*

Also an action of the case will lie for me against him which ought to repair a mound or bank of the sea, or of any great river, and doth it not, by which my land is drowned; so of the bank of a river. 29 *Ed. 3. 32. 12 H. 4. 7. 15 Ed. 4. 18.*

Note; But if the breach and inundation be by any extraordinary accident, as by tempest, or the like, no action lieth. 10 *Co. 139.*

If the highway be to be repaired by any special person, and is not, and I have any special damage thereby, I may have case for it. 5 *Ed. 4. 3.*

If there be a charge upon any man, by reason of the tenure of his house or land, to repair any private way, bridge, gutter, or the like, and he doth it not, and thereby I have any special damage, action lieth against him. *Old Book of Entries, f. 20.*

So I may have an action on the case against one for not repairing of a house ready to fall on my house. 22 *H. 7. 98. pl. 4.*

If one have a room over me in a city, or other place, and so carry himself in it as to annoy me that am under him; as if he have a shop or warehouse over me, and I have a cellar under it, and he lay such an extraordinary weight of goods more than usually have been, and so break it down
upon

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upon me, I may have case against him for it. *Popb. 46.*

If I have a building beneath, and another man a building above me, and I suffer mine to decay so as to hazard his, or he suffer his to decay so as to hazard mine, each of us may have an action on the case against the other. *Keilw. 48. See 1 Brownl. 4.*

If a man doth over-build my house, so that his house-eaves do drop upon my house, and cause it to perish, or trouble my dwelling, I may have an action on the case against him. *14 Brownl. and Goldsb. 4.*

If a man set up a house upon a new foundation so near to my antient house, that thereby he stops up my windows, and takes away my light, the air and prospect, I may have an action on the case. For a man may not in *London*, or elsewhere, enlarge his house in breadth or length to stop his neighbour's light; but upon an antient foundation he may build it as high as he will; for *cujus est solum, ejus est usque ad cælum. 5 Co. 10. 9 Co. 55, 56.* See after; and see the act for rebuilding of *London*.

If a man shall build or set up a wall against the window or light of my house, I may have an action against him, albeit he build upon his own ground. So if he set up a wood-pile upon his own ground to stop up lights, I may have an action. *9 Co. 54. 5 Co. 108.* But if it prevents my prospect only, no action will lie for this. *Co. 8. 57. 1 Mod. Rep. 55. T. Raym. 87. 1 Sed. 167.*

But if two men be owners of two parcels of land adjoining, and one of them build a house on his land, and make windows and lights looking into the other's lands, and this continueth thirty

or forty years, the other may build or lay any thing upon his own land, and stop them. 1 Cro. 118, 129. 1 Bull. 116.

If one house be built hanging over another wrongfully, and after they came both into one hand, the wrong is now purged; so that if after they come into several hands, neither party is to complain of the wrong done before. Hob. 173.

Note; The erecting of a dye-house, tan-house, brew-house or lime-kiln, may be a nuisance to a neighbourhood, by which if I have any considerable offence in the smell to my health, or by the smoke to our bodies that live in the house, or to trees of the garden or yard, I may have an action of the case for my relief. Pasab. 5 Jac. B. R. 5 Co. 73, 101, 108. 9 Co. 54.

If one sets up a pig-sty under my house, and keeps pigs in it, or house of office, and use it so near to my house, that the smell thereof doth annoy me, and hazard my health, &c. I may have an action. 5 Co. 73, 101, 108. 9 Co. 54.

So the keeping of a chandler's or butcher's shop so near my house, in a place inconvenient, to the offence of me in my garden or house, may be such a nuisance for which I may have an action. New Book of Entries, f. 11. Trin. 13 Car. B. R. 5 Co. and 9 Co. ut supra.

But if such a man shall set up his trade by me, though this be offensive to me, by the laying of stinking heaps at his door, and the like, I can have no action for this, unless it be very great, and much offensive. 1 Cro. 367. 13 H. 7. 26. yet this is indictable. So if a man erects buildings near the king's common highway, and near dwelling-houses; and there makes acid spirit of sulphur,

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sulphur, whereby the air is impregnated with noisome and offensive stinks, &c. *Bur. Rep.* 333.

If one throw a beast dying of the murrain, or the intrail or offal of it into my ground, whereby my beasts are infected and die, I may have case against him. *Style's Rep.* 50.

If one set out his tithes duly, and the parson will not take them away in convenient time, action lies. *Lord Raym.* 187. *Str.* 245.

So if one that hath bought hay upon my ground, or in my house, and suffer it to lie long, whereby I am damaged. *Godb. Rep.* pl. 424. *Et sic de similibus.* *Quere.*

CHAP. X.

Some further Observations relating to Covenants in Leases, &c. With several modern resolved Cases relating to Pleadings in Covenants upon Leases.

A Covenant is either expressed in the deed or implied by law; as by the words *demise* or *grant*, the law doth imply and intend that the lessee shall quietly enjoy during the lessor's life. *4 Co.* 8. *Dyer* 338.

A covenant may be in the affirmative, or in the negative, and it may be executed, that is of a thing already done; executory, i. e. of a thing that shall be done hereafter: But if it be of a thing present, it may be void; as if I covenant that my house is yours, this is void. *Plowd.* 330.

Cove-

Covenants made by deed poll are as good and effectual as those made by deed indented, so as the party have the deed to shew; but covenant doth not lie upon a verbal agreement, neither can it be grounded without a writing, except by some special case, as in *London. 3 Co. 63.*

There needs no great formality in the words to make a covenant; for if the words of a deed run thus, *That the lessee shall repair, provided always, that the lessor shall allow timber; or That the lessee shall scour ditches, provided that the lessor do carry away the earth; also, That the lessee shall pay twenty shillings a year rent; or, That the lessee shall not alien,* and the like; these are said to amount to good covenants on both sides, &c. *Dyer 57, 150. 2 Co. Lord Cromwell's case.*

But regularly in all cases, where words that do begin the sentence be conditional, or have the effect of a condition, and do give another remedy, there they shall not be construed to make a covenant: Yet if words of condition and words of covenant be coupled together in the same sentence, (as, *Provided always, and it is covenanted,* and the like) in such cases the words may be construed to make a covenant and condition both. *Bri. Cov. 21, 26, 38.*

And note; That where a covenant is penned conditionally, and so as one thing is the cause of another, (as if one covenant to pay me 10*l.* if I serve him a year; or to new build a house so as he may have the old materials) in all these cases, if the cause or condition be not observed, the covenant shall not be performed. *Co. Lit. 204. Dyer 371.*

Where

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Where the substance and matter of a covenant to do any thing is lawful, such covenant is good; and generally where a condition for the matter of it is good, a covenant comprehending the same matter is good also.

But if the matter required to be or not to be done by the covenant, be unlawful in the substance thereof, then is the covenant void, and doth not bind: So if the covenant be impossible. *Dyer* 6, 13, 324, 251, 253.

A covenant is to be always most strongly taken against the covenantor, and most in advantage of the covenantee.

To be taken according to the intent of the parties.

When no time is limited for the doing of a thing, it shall be done in reasonable time. *Plow.* 287.

Any one that is party to the deed to whom the covenant is made, may take advantage of the covenant, but not a stranger.

As if *A.* covenant with *B.* to do an act to *C.* who is no party to the deed, and he doth it not; *B.* and not *C.* must sue him upon this breach.

And regularly all those that do seal and deliver the deed, and are named and bound by the express words of the covenant, (whether it be collateral or inherent) are bound by the covenant contained in the deed.

And therefore if heirs, executors, administrators or assigns, be named in the covenant, for the most part they are bound by the covenant.

And in all cases of inherent covenants, (*i. e.* that tend to the support of the thing granted) where a man doth covenant for himself only, and doth

doth not name his executors and administrators, or either of them; yet they are bound, and may be charged with the covenant notwithstanding; and in some cases the law is so also for collateral covenants.

And in most inherent covenants, such as have the land, albeit they be neither executors nor administrators, or either of them, but assigns, &c. shall be charged by the covenant, though they be not named; for these covenants are said to run with the land. *5 Co. 16, 17, 18.*

Where the deed itself, wherein the covenants are contained, or the estates on which the covenants do depend is gone and determined, there regularly the covenants are gone also.

But the surrender of a lease doth not discharge the breach of covenant, which was before the surrender. *Dyer 10.*

Where a covenant is become impossible to be done by the act of God, by this the covenant is discharged; as where *J.* covenants to serve *B.* seven years, and dies before the seven years be expired. *1 Co. 98. Plow. 286.*

Where there is an express covenant in a deed for quiet enjoyment, the implied covenant is gone. *2 Co. 80.*

By a release of all covenants from the covenantee, the covenant is discharged, so as the release be by deed, for a covenant by deed cannot be discharged by word. Therefore if *A.* covenants with *B.* to build a house by a day, and in the mean time *B.* doth bid or desire him to let it alone; this doth not discharge the breach of the covenant; but the lessor may sue for it notwithstanding. *Pasch. 6 Car. B. R.*

Note;

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Note; If there is only a hand to a writing, and not a seal, covenant lies not, but case upon the agreement; and you declare, that in consideration the plaintiff had promised to perform the agreement on his part, the defendant promised to perform on his part, &c. and then assign the breach, &c.

Where in a covenant, the latter words being general, shall be restrained and expounded by the former which were special; *vide Saund. Rep. 1 Par. fol. 59, 60.*

Where in a covenant the former general words shall be restrained and expounded by the latter special words. *Idem 59.*

In covenant, the former general words, That the original lease is indefeasible, shall not be restrained by the latter words, That the assignee *habeat, teneat & gaudeat*, &c. without any let, &c. of the assignor. *Id. 60.*

A particular covenant in a deed may restrain a general covenant in law. *Ibid.*

Covenant that he was seised in fee, (notwithstanding any act done) and that the lands were of the yearly value of 260 *l.* there the words *notwithstanding*, &c. may not be applied to the covenant concerning the value. *Ibid.*

What action of covenant lies for an assignee of a reversion at common law. *Id. 238, 239.*

Action of covenant by an assignee of a reversion against the lessee for rent, need not be laid in the county where the land lies. *Idem 239, 240, 241.*

An action lies for a lessor or his assignee against the lessee, upon his covenant for payment of rent, notwithstanding that the lessor or his assignee had accepted

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accepted rent before of the assignee of the first lessee; for covenant is not like an action of debt for rent. *Idem* 240, 241.

If by a deed sealed by both parties it is agreed, that the defendant shall give the plaintiff such a sum for all his lands in *A.* it will amount to a covenant on the part of the plaintiff to convey the land. *Idem* 230.

Where covenant lies upon the word *demise*, and where not. *Idem* 321, 322.

Where covenant lies for *misfeasance*, but not for *nonfeasance*. *Idem* 322, 323.

If a man by deed grant a water-course, and stop it, the grantee may have an action of covenant. *Idem* 322.

If one of the parties covenant to assure lands, and the other, in consideration of the same covenant performed, covenant to pay a sum of money, he is not obliged to pay the money until the lands be assured.—But it is otherwise if the covenant had been in consideration of the covenant to be performed. *Saund. Rep. 2 Par.* 156.

Where, in mutual covenants the words, *In consideration of the performance thereof*, shall make a condition precedent, and where not. *Idem* 156, 157.

If the covenant of the one part be negative, and the affirmative covenant on the other part be in consideration of the performance thereof; although the negative covenant is broken, yet the affirmative covenant ought to be performed. *Idem* 157.

A negative covenant is not said to be performed until it become impossible to break it. *Ibid.*

In

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In covenant upon a warranty of lands for years, the plaintiff ought to shew what estate or right he that entered into the lands had at the time of his entry; and it is not sufficient to aver, that he had a good title. *Idem* 178, 179, 180, 181.

What warranty shall be taken only for a covenant. *Idem* 180.

An action of covenant lies against a woman upon a warranty by her and her husband, annexed to her estate for years in a fine. *Idem ibid.*

Where, by the grant of a reversion, the rent reserved upon a lease for years is well transferred to the grantee, the law transfers also to him the covenant of the lease for the payment of it, as incident to the rent. *Idem* 371.

If in an action of covenant any breaches are well assigned, and others ill, and the defendant demurs to the whole declaration, the plaintiff shall have judgment for those breaches that are well assigned, and for the residue he shall be barred. *Id.* 380.

By Stat. 8 & 9 W. 3. c. 10. In all actions in courts of Record upon any bond or penal bill for non-performance of covenants, the plaintiff may assign as many breaches as he shall think fit, and the jury at the trial shall assess damages for such breaches so assigned, as the plaintiff shall prove broken, &c.

If judgment is given for the plaintiff upon demurrer, confession or *nil dicit*, the plaintiff upon the roll may suggest as many breaches as he shall think fit, upon which, shall issue a writ, to summon a jury to appear at the assizes of that county, to enquire into the truth of every one of such breaches, and to assess damages accordingly; and the

the justices of assize shall make a return thereof to the court from whence the same issued.

In case the defendant, after such judgment entered, shall pay into court such *damages* assessed and costs of suit, a stay of execution shall be entered of record. Or if, by reason of execution executed, the plaintiff, &c. shall be paid such damages with costs, the body, lands and goods of the defendant shall be discharged, and the satisfaction entered upon record. Yet such judgment shall stand and be as a further security, to answer the plaintiff, his executors, &c. such damages as shall be sustained for further breach of any covenant in the same deed or writing contained, &c.

At common law the jury may find the penalty, but relief may be had in equity.

Resolved Cases as to pleadings in Covenant upon Leases.

In covenant against an assignee for not repairing a house, defendant pleaded in bar an accord between him and the plaintiff, and execution of it in satisfaction of the reparations. It was objected, That neither arbitrament, nor accord with satisfaction, is a plea, when an action is founded upon a deed, because matter *in fait* cannot be avoided by matter *in pais*; so when an action is in realty, or mixt with the realty, accord with satisfaction is no plea, and is not a bar for the personalty; but it was adjudged that the plea was good: And a difference was taken, where a duty accrues by a deed in a certainty, as by covenant, bill or obligation to pay a sum of money; there, because it takes its essence by writing, it ought to be avoided by matter of as high a nature; but

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when no certain duty accrueth by the deed, but a default subsequent gives only damages, there accord with satisfaction is a good plea, 6 Co. *Blake's* case.

Vide 2 Keb. p. 51. The court held, That an accord was a good plea to a covenant to pay a sum certain, or an obligation when joined with other things uncertain. But concord after the deed cannot be a bar to such covenants as were not broken. 2 Roll. 187, 188.

Moved for a repleader in an action of covenant, to perform articles and payment of money, where to the defendant had pleaded payment of the money after the day, which the plaintiff accepted; and because it was not pleaded by way of accord and satisfaction of the covenant wherein damages also are recovered, said to be ill. And this issue being insufficient, and found for the defendant, it is not aided by the statute of *Jeofails*. And by *Twisden*, payment pleaded to a single bill, if found for the plaintiff, he shall have judgment; if for the defendant, there shall be a repleader; *sed adjournatur*. 1 Keb. 210. *Vide 3 Cro. 445. pl. 2. Goldsb. 100, pl. 11.*

In covenant brought against a lessee for years, for not keeping the house in repair, the defendant pleaded in bar, That the house was burnt by casualty; it was holden to be no good plea in bar, for that a lessee that covenanteth to repair, ought to do it, be his house burnt by negligence, or by any other means. *Style 162. Crompton and Allen's case.* See at the latter end of this Treatise.

Defendant pleads, the house was burnt, but repaired in convenient time before action brought: The plaintiff demurred, because not shewn by whom,

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whom, not by the defendant himself: But the court said, That being repaired, though by a stranger, was a good plea; but in truth the plaintiff had repaired it, and because it was a hard case, the court suffered him to wave his demurrer, and take issue Not repaired in convenient time, the house being uncovered. 2 *Keb.* 535.

Vide 3 *Keb.* 40. The like plea and demurrer, because the time not put in certain; *sed non allocatur*, the first of *July* sufficient.

adly, Because not said who repaired; and *per cur'*, The house being rebuilt by the plaintiff himself, and the defendant's executors and administrators bound to repair it; the plea is ill, and must shew who repaired it; for if the plaintiff built it, this is no excuse; and judgment for the plaintiff.

If a lessee for years covenanteth to leave wood in as good plight as it was at the time of the lease, and afterwards the trees are overturned by a tempest, he may plead this matter in bar, and it shall discharge him of his covenant, *quia impotentia excusat Legem.* 1 *Co.* *Shelly's case.* 40 *Ed.* 3. 6.

Upon a covenant in an indenture of lease, the breach was for non-payment of rent. Defendant pleaded in bar, that the plaintiff entered into part of the land demised before the rent was due, for which the action was brought, and so had suspended his rent. Plaintiff replied, The defendant did re-enter, and so was possessed as in his former estate. And it was held ill by the court, because the plaintiff did not shew that the defendant continued the possession till the rent grew due, but only that he was possessed in his former right; but the plea in bar was a good plea, and

judgment

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judgment against the plaintiff, *quod nil capiat per Billam. Style 243. Page and Parr's case.*

Vide 3 Keb. 858. In covenant, breach for not repairing. Defendant pleads entry into part and building, &c. Plaintiff demurred.

In covenant against defendants, executors to C. lessee, for rent in arrear in the defendant's time, Defendants plead assignment before rent arrear; plaintiff demurred. — *Per cur'*: The debt may be in the *debet et detinet* on the executor's possession, and then such assignment is a good plea. *Contra* on express covenant, where the executor is charged as such; but if charged as assignee only, then the plea were good of assignment before rent arrear; and here judgment must be *de bonis testatoris*, therefore judgment for the plaintiff, *nisi. 3 Keb. 363.*

In an action of covenant on demise of a free-stone-quarry to the defendant, the defendant covenants not to dig in any other part of the common, and breach being assigned in digging, defendant pleads *non locavit* the quarry *prædict*; to which the plaintiff demurs, the demise being by indenture, and the covenant collateral, the plea was held frivolous, and judgment for the plaintiff, *nisi. 1 Keb. 715.*

In an action of covenant for not repairing a house, the defendant pleads performance, and after rejoins, that he was ousted by a stranger; which *per curiam*, on demurrer of the plaintiff, is a departure; judgment for the plaintiff, *nisi. Idem 662.*

Upon covenant to pay money, *utlary* a good bar. *Idem 324.*

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Non infregit conventionem is tried where the house is not repaired. *Idem* 575.

In an action of covenant for rent in arrear on a lease for years, the defendant pleaded a general release of all demands, (which was made by award on collateral differences between them) made after the covenant, and before the rent due; to which the plaintiff demurred, for that the cause of the release was particular and collateral. And judgment for the plaintiff, *nisi*. *Idem*, p. 499, 510, 511. 2 Cro. 107, 486. Mo. 544. *Et vide* Bridgm. 124, & 20 Aff. 5.

See 3 Keb. 814. Release of all demands. Demurrer because the release is particular, and bars not for a covenant broken; so after cause of action by battery, release of all demands in personal estate no bar. 3 Keb. 418. A covenant broken is not discharged by release to executor of all demands of personal estate of the testator.

In covenant for rent on *nil debet* pleaded, the plaintiff demurred specially; because albeit the covenant doth not alter the rent, yet *nil debet* cannot be pleaded. But the court said it was well enough. 3 Keb. 347.

Covenant to enjoy against lawful impediment, is broken by entry of one *habens jus*. 3 Keb. 40. So by one *clamans jus*, and not said *legale*. *Idem* 163. Entry *clamans titulum*, not said by a stranger, and since the covenant, no breach. 2 Keb. 146.

In covenant on indenture, 8 Oct. 1652. of demise to hold for 99 years after the death of Z. K. if three lives so long live; defendant pleads, That the plaintiff *potuit uti* and enjoy the premises without the let of the lessor. To which the plaintiff replies, That the lands are and were duchy lands,

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lands, and that the king for fine and rent had demised the reversion to *H.* for 99 years, if the three lives live, by reason whereof he could not enjoy. Defendant demurs, and judgment for the plaintiff: All this being confessed by the demurrer, the plaintiff needs not shew that he entered, but the defendant should plead it. *3 Keb. 162, 202.*

Covenant on two deeds of former husband of the defendant's wife, to cut twelve of the best trees, whereby the plaintiff hath election: And breach is assigned, That before the time the defendant cuts down some of the trees. Defendant saith, There were sufficient standing; to which the plaintiff demurred. *Vide 3 Keb. 477.*

Covenant no duty, nor cause of action, till broken; and therefore not discharged by release of actions. *Alley's Rep. 39. Vide antea.*

Covenant to perform certain indentures, and to save the plaintiff harmless; he cannot plead generally performance of covenants, because some may be in the negative; and also he ought to shew how he saved him harmless. *Alley 72.*

If the lease is not good, there is no covenant nor breach. *Yelv. 18, 19.*

Note, That all covenants between the lessor and lessee are covenants in law, or express covenants. *Vaugh. Rep. 118.*

An express covenant restrains the general covenants in law. *Idem 126.*

Where the covenant is to enjoy against one or more particular men, and where against all men. *Idem 127.*

By a covenant in law, the lessee is to enjoy his term against the lawful entry or interruption of any man; but not against tortious entries, because

cause the lessee hath his proper remedy against the wrong doers. *Idem* 118, 119.

If a stranger who hath no right outs the lessee, he shall not bring covenant against the lessor, because he hath remedy by action against the stranger: But if he enter by elder title, then he shall have covenant, because he hath no other remedy. *Idem* 119, 120.

Though the covenant is, That the lessee shall enjoy against all persons; yet he shall not have covenant against the lessor, unless he be legally ousted. *Idem* 119, 120, 121, 123.

The law will never adjudge that a man covenants against the wrongful acts of strangers, except the words are full and express. *Idem* 121.

When the covenant is to enjoy against all men, the covenant is not expressly to enjoy against tortious acts, neither shall the law so interpret it. *Idem* 123, 125.

What collateral matters shall be implied upon a covenant. *Vide 1 Ven. Rep. p. 26, 44, 45.*

Though a covenant be made only to a man, his heirs and assigns; yet if the breach be in his life-time, his executors may bring the action for damages. *Idem* 176.

That a covenant for quiet enjoyment may bind, notwithstanding a subsequent act of parliament to alter the title. *Idem* 175, 176.

In an action of covenant, the defendant cannot plead, That the plaintiff *tempore quo, nihil habuit in tenementis*; though such a plea in an action of debt for rent is good. *2 Vent. Rep. 99.*

Covenant to repair a house; if the lessee come without licence after the term ended to repair the house, he is a trespasser. *2 Roll. 250.*

Note

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Note the difference between covenants in gross and covenants grounded upon a lease; covenants having a lease for their foundation are within the proviso of the statute of 13 *Eliz. cap. 5.* but not in gross. 2 *Roll. 401.*

In an action of covenant to repair, and so to leave the premises, the breach was in sixty rood, &c.

Defendant pleads that one barn was pulled down by the plaintiff's consent; and as to the rest, that they were repaired, and so left: To which the plaintiff demurred generally. *Per* chief justice, He should either have taken issue, that he repaired the particulars; or say, that they were not in decay *modo & forma.* And the parties agreed to take issue on one of the points. 2 *Keb. 798.*

C H A P. XI.

An Abstract of an Act of the 14th of George the Third, for the further and better Regulation of Buildings, and Party-walls; and for the more effectually preventing Mischief by Fire within the Cities of London and Westminster, and the Liberties thereof, and other the Parishes, Precincts, and Places, within the Weekly Bills of Mortality, the Parishes of Saint Mary-le-bon, Paddington, Saint Pancras, and Saint Luke at Chelsea, in the County of Middlesex; and for indemnifying, under certain Conditions, Builders and other Persons against the Penalties to which they are or may be liable for erecting Buildings within the Limits aforesaid contrary to Law.

AS an act, made 12 Geo. 3. c. 73. intituled, *An act for the better regulation of buildings and party-walls within the cities of London and Westminster, and the liberties thereof, and other the parishes, precincts, and places in the weekly bills of mortality, the parishes of Saint Mary-le-bon and Paddington, Saint Pancras, and Saint Luke, at Chelsea, in the county of Middlesex; and for the better preventing of mischiefs by fire within the cities, liberties, parishes, precincts, and places; and*
for

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for amending and reducing the laws relating thereto into one act, and for other purposes, hath been found insufficient: And as it may tend to the safety of the inhabitants, and prevent great inconveniences to builders, and workmen employed in buildings, within the said cities, liberties, and places, if the regulations contained in the said act were repealed, and other regulations respecting such buildings were established, it is enacted, That the several churches, chapels, meeting-houses, and all other buildings, at any time heretofore begun or built, or which shall, at any time hereafter, be begun or built within the said cities, liberties and places, on new or old foundations, shall be distinguished by, and divided into, the seven several classes of building after described; and such seven several classes shall be under the directions after contained.

Every church, chapel, meeting-house, and place of worship; and every house or building for distilling of liquors for sale, making of soap, melting of tallow, dying, boiling, or distilling turpentine, casting brass or iron, refining of sugar, making of glass for chymical works, of what dimension soever; and every warehouse and building, not being a dwelling house, built, or to be built, (except such buildings as are after declared to be of the fifth, sixth, or seventh class of building), which shall exceed three clear stories above ground, exclusive of the rooms (if any) in the roof, or which is of the height of thirty-one feet from the surface of the pavement, or way, above the area before either of the fronts thereof, to the top of the blocking-course or the coping on the parapet; and every dwelling-house

house built, or to be built, which, with the offices thereunto belonging, otherwise than by a fence-wall, or covered passage, open on one or both sides, when finished, shall exceed the value of 850*l*; and also every dwelling-house, which shall exceed nine squares of building on the ground-floor, each square containing one hundred superficial feet, shall be deemed the first class of building.

Every front or other external wall, (not being a party-wall), after the 24th of *June*, 1774, built to a first rate building, or to an addition thereto, shall be built at the foundation of the thickness of one foot nine inches and an half at the least; and shall gradually diminish on each side of the wall two inches and a quarter to the top of the footing of every wall, except where any adjoining building will not admit of such footing being made on the side of such wall next such adjoining building; in which case such footing shall be made as near to the dimensions directed as the case will admit; which footing shall be nine inches high at the least, and wholly below the flooring-boards of the cellar-story two inches at the least; and every such wall shall, from the top of such footing, be of the thickness of one foot five inches and an half at the least, up to the under side of the one pair of stairs floor; and from thence of the thickness of thirteen inches at the least up to the under side of the plate under the roof; and from thence of the thickness of eight inches and an half at the least, up to the under side of the blocking-course of every first rate building; except such parts of every wall as shall be wholly of stone, which parts shall

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shall be of the thickness of fourteen inches below the ground-floor, and of nine inches above the ground-floor; and except all recesses above the ground-floor in the said walls, which shall be arched over in every story, so as that the arch, and the back of such recess, shall be of the thickness of eight inches and an half at the least.

Every party-wall after the 24th of June, built to a first rate building, or an addition thereto, shall be built at the foundation of the thickness of two feet six inches and an half at the least; and shall, from thence, gradually diminish on each side four inches and an half to the top of the footing of every wall, which footing shall be one foot high, and wholly below the flooring-boards of the cellar story two inches at least; and every party-wall shall, from the top of such footing, be of the thickness of one foot nine inches and an half to the under side of the ground-floor; and from thence of the thickness of one foot five inches and an half to the under side of the floor of the rooms in the roof of the highest building adjoining to such party-wall; and from thence of the thickness of thirteen inches, to the top of every such party-wall.

Every building, not being a dwelling-house, except such as are of the first, fifth, sixth, or seventh class, which shall exceed two clear stories, or contain more than three clear stories above ground, exclusive of the rooms in the roof, or which shall be of the height of twenty-two feet, and shall not be thirty-one feet high, from the surface of the ground, before the fronts thereof, to the top of the parapet thereof; and every

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dwelling-house to be built, which, with the offices thereto belonging, otherwise than by a covered passage open on one or both sides shall exceed the value of 300*l.* and shall not amount to more than 850*l.*; and every dwelling-house, which shall exceed five squares of building on the ground plan, and shall not amount to more than nine squares of building on the ground plan thereof, shall be deemed the second rate of building.

Every front, or external wall, (not a party-wall), which shall, after the 24th of June, be built, to a second rate building, or to any addition thereto, shall be at the foundation of the thickness of one foot five inches and an half, and shall from thence gradually diminish on each side of the wall two inches and a quarter to the top of the footing of every wall, except where an adjoining building will not admit of such footing being made; in which case such footing shall be made as near to the dimensions directed as the case will admit; which footing shall be nine inches high, and wholly below the flooring-boards of the cellar story two inches; and every wall shall, from the top of such footing, be of the thickness of thirteen inches, to the one pair of stairs floor; and from thence eight inches and an half, to the coping on the parapet of every second rate building; except such parts of every wall, being above the ground-floor, wholly of stone, which parts shall be of the thickness of nine inches; and except recesses above the ground-floor in the walls, which shall be arched over, so as that the arch and the back of each re-

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cess shall be of the thickness of eight inches and an half,

Every party-wall, after the 24th of June, built to a second rate building, or addition thereto, shall be, at the foundation, of the thickness of two feet six inches and an half, and from thence gradually diminish, on each side of the wall, four inches and an half to the top of the footing of every wall; which footing shall be nine inches high, and wholly below the flooring-boards of the cellar story two inches; and every party-wall shall, from the top of such footing, be of the thickness of one foot nine inches and an half, up to the ground-floor; and from thence one foot five inches and an half, up to the floor of the two pair of stairs story; and from thence thirteen inches to the top of every party-wall.

Every other building, not being a dwelling-house, except declared to be of the first, fifth, sixth, or seventh class of building, which shall exceed one story, and not contain more than two stories above ground, exclusive of the rooms in the roof, or is of the height of more than thirteen feet, and not twenty-two feet from the pavement, before the fronts thereof, to the top of the coping on the parapet thereof; and every dwelling-house, with the offices thereto belonging, otherwise than by a fence-wall, or covered passage open on one side, when finished, shall exceed 150 $\frac{1}{2}$, and shall not amount to more than 300 $\frac{1}{2}$; and every dwelling-house, which shall exceed three squares and an half of building on the ground plan, and shall not amount to more than five squares on the ground plan thereof, shall be deemed the third rate of building.

Every

Every front, or external wall, (not a party-wall), which shall, after the 24th of *June*, be built to a third rate building, or to an enlargement thereof, shall be, at the foundation, of the thickness of one foot five inches and an half, and from thence gradually diminish, on each side, two inches and a quarter, to the top of every wall, except where an adjoining building will not admit of such footing on the wall next such building; then the footing shall be made as near to the dimensions directed as possible; which shall be six inches high, and wholly below the pavement and flooring-boards of the cellar story two inches; and every wall shall, from the top of such footing, be of the thickness of thirteen inches, up to the under side of the ground-floor; and from thence eight inches and an half, up to the under side of the coping on the parapet.

Every party-wall, after the 24th of *June*, built to a third rate building, or to an enlargement thereof, shall be, at the foundation, of the thickness of two feet two inches, and thence gradually diminish on each side four inches and an half, to the top of every wall, which footing shall be nine inches high below the pavement and flooring-boards of the cellar story two inches, and from the top of such footing be of the thickness of one foot five inches and an half, up to the under side of the ground-floor, and from thence thirteen inches up to the top of every party-wall.

Every warehouse and building not being a dwelling-house, except such as are of the first, fifth,

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fifth, sixth, or seventh class, which shall not exceed one story above ground, exclusive of the rooms in the roof thereof, or which is not of the height of more than thirteen feet from the surface of the pavement before either of the fronts to the coping on the parapet; and every dwelling-house now built, or to be built, which, with the offices thereto belonging, connected otherwise than by a fence-wall, open on one or both sides, does not exceed 150*l.* in value; and every dwelling-house which does not exceed three squares and an half of building on the ground plan, shall be deemed to be of the fourth rate or class.

Every front or external wall, which shall, after the twenty-fourth of *June*, be built to a fourth rate building, or to an enlargement thereof, shall be, at the foundation, of the thickness of one foot five inches and an half, and from thence gradually diminish on each side two inches and a quarter to the top of the footing, except where an adjoining building will not admit of such footing; then the footing shall be made as near to the dimensions directed as possible, which footing shall be six inches high, and wholly below the flooring-boards of the cellar story two inches; and from the top of such footing be of the thickness of thirteen inches, up to the under side of the ground-floor; and from thence eight inches and an half, up to the under side of the coping on the parapet.

Every party-wall which shall, after the 24th of *June*, be built to a fourth rate building, or to an enlargement thereof, shall be of the thickness

ness of one foot five inches and an half, and shall gradually diminish on each side two inches and a quarter to the top of the footing of every wall; which footing shall be nine inches high, and wholly below the flooring-boards of the cellar story two inches; and from the top of such footing, shall be of the thickness of thirteen inches, up to the under side of the ground-floor; and from thence eight inches and an half, up to the top of such wall.

After the 24th of *June*, every house built, of the first, second, third, or fourth rate of building, and not having a distinct side-wall on the parts where they shall be contiguous, shall have party-walls between house and house, or between so much of them as shall not have such separate walls as aforesaid: And such party-walls shall extend to the outer surfaces of the external inclosures of each of the adjoining houses: And all party-walls, chimnies, and chimney-shafts, shall be built wholly of good sound bricks or stone, except such timber, wood, lead, or iron work laid therein, according to the directions contained, and except piling, &c. necessary for the foundation thereof; and shall be topped with stone or brick, of the dimensions directed; and one half of every party-wall between other buildings shall be built on the ground of one of the adjoining houses, and the other half on the ground of the other adjoining houses; and the first builder of such party-wall, and workmen employed in building the same, may enter upon the ground in order to build such party-wall in manner aforesaid.

Every

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Every party-wall which shall, after the 24th of June, be built to a dwelling-house, exceeding four stories in height, exclusive of the rooms in the roof, shall be built according to the directions contained with respect to party-walls of the first rate, though not of the first rate; and every party-wall, after the time aforesaid, built to a dwelling-house containing four stories in height, exclusive of the rooms in the roof, shall be built according to the directions, with respect to party-walls of the third rate, notwithstanding such house be of the fourth rate.

Every internal inclosure to be made, after the 24th of June, for separating any building of the first, second, third, or fourth class, from other buildings, in separate occupations, and every addition to such internal inclosure, shall be of brick, artificial stone or stucco together; except wood, lead, or iron work, laid therein, according to the directions for external inclosures to such first, second, third, or fourth class of building, and also except piling or planking, necessary for the foundation of the same.

In valuing buildings of the first, second, or third class, and ascertaining the rate thereof, such valuation is to be made by the surveyor appointed pursuant to the act, for the district in which the building is situated; and every building shall, notwithstanding any decay, be estimated as if the materials whereof the same consists were sound, and the work new; and at the prices the like materials and workmanship shall be worth at the time such valuation is made; but neither the soil whereon any building stands, nor any fence, except railing to areas; and steps before
or

or behind the building, made for inclosing such building, with the appurtenances thereto belonging, from a neighbouring ground, nor any arched vault, under the ground, before or behind such building, nor lead or covering over such vaults, nor such parts or party-walls to such building as stand upon the ground not belonging to such house, shall be included in any valuation; and in ascertaining the squares of building in every dwelling-house, the same shall be taken on the level of the floor, at the principal entrance to such dwelling-house, and only such parts of the party-walls as belong to such house shall be included in such admeasurement: And if the owner, or persons interested in such building, shall be injured by the admeasurement made by such surveyor, owner, or other person, they may apply to the mayor, or justices for the city of *London*, if such building is situated within the city, or otherwise to any justices within whose jurisdiction the same is situated; and the mayor or justices shall enquire into the matter, and by their order, declare such building to be of such class as the same shall appear to be of, according to the description of the rates before contained; and the parties between whom such order shall be made may appeal to the justices at their general quarter sessions, whose determination shall be conclusive to all parties.

Every dwelling-house, and other building, (except buildings not being dwelling-houses, as are of the first or seventh class of building), which is at the distance of four feet, and not eight feet, from a publick road or causeway, and detached from any other building not in the same possession

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possession therewith sixteen feet, and not thirty feet, or connected with any other building by a fence, shall be deemed of the fifth class, and shall be built of any dimensions whatever.

Every dwelling-house, and other building, (except buildings, not being dwelling-houses, as are of the first class) which is at the distance of eight feet from a publick road or causeway, and is detached from any building not in the same possession therewith thirty feet, or connected only by a fence wall, shall be deemed of the sixth class, and may be built of any dimensions and materials whatever.

Every cranehouse, built on any wharf, and every shamble, windmill, &c. and building situate without *London* and *Westminster*, and the liberties thereof, used for workshops or drying-places for tanners, fell-mongers, glue-makers, size-makers, callico-printers, whittlers, whiting-makers, curriers, leather-dressers, buckram-stiffeners, oil-cloth painters, wool-staplers, throwsters, parchment-makers, and paper-makers, so long as they are used for those purposes, shall be deemed the seventh class of building, and may be built of any dimensions whatever.

Every cranehouse, built after the 24th of *June*, and every addition to a cranehouse already built, or to be built, and every new side end, or external inclosure, which shall, after the 24th of *June*, be made, shall be of stone, brick, slate, tile, oak, elm, steel, iron, or brass; but every other building of the seventh class may be erected of any materials whatever; and no cranehouse or other building of the seventh class, or any external part thereof, shall, after 24th of *June*, be covered with pitch,
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or other inflammable composition; nor shall, after the said date, be converted to any other use.

Every office which shall be detached from such building to which the same belongs, or connected therewith by a covered passage open on one or both sides, shall be deemed of the class of building such office would be of, if it did not appertain to any dwelling-house.

As some houses, erected before the 24th of June, may have party-walls, although not built agreeable to the rules directed to be observed concerning party-walls to be built, after the said date, and it may happen that the adjoining houses may hereafter be rebuilt without making use of such party-walls, every such wall may remain as a party-wall unto both houses to which the same belongs shall be rebuilt, (if such wall continue sound), and no longer: And if either house to which such party-wall does belong shall be rebuilt with a wall against such party-wall, (without using such party-wall) of the heights and thickneses prescribed, the proprietor of such remaining house shall not, when such old party-wall shall be taken down, be intitled to more than one half of the materials, nor to more than an half of the ground on which it was erected; nor shall such proprietor build on more than half of the ground, unless he agree with the owner of such adjoining house for the other half thereof; and if the parties cannot agree, and be desirous of buying and selling, the price, &c. shall be settled by a jury, to be summoned, returned, and impanelled, as mentioned concerning mixed property: But if such remaining house be of the first, second, or third class, or be four stories high,

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high, exclusive of the rooms in the roof, and such old party-wall be not of the thickness of one foot five inches and an half, from the foundation to the under side of the ground-floor, and from thence to the top of the thickness of thirteen inches; then such wall shall, when either of the houses to which it belongs shall be rebuilt, be considered as if it had been adjudged ruinous, pursuant to the directions for condemning an unsound party-wall; or if such party-wall shall have any timber of an adjoining building lying through the same, and if, when either of the houses shall be rebuilt, the owner of such adjoining house will not permit so much of such timber to be cut off as shall leave six inches of clear brick-work beyond the end of every such timber, then such wall shall be considered as condemned, pursuant to the act, and shall be taken down and rebuilt, in such manner as directed concerning party-walls adjudged ruinous.

As some houses, erected before the 24th of June, 1774, may have a good timber partition between the same and the adjoining building, such partition may remain until the adjoining houses shall be rebuilt, or have one of the fronts which abutt on such partition taken down to the one pair of stairs floor, and rebuilt, or until such partition shall be condemned, pursuant to directions concerning ruinous party-walls, and no longer.

No wall of a building of the first, second, third, or fourth class, erected or to be erected, or of any addition made thereto, which shall not be a party-wall on the 24th of June, shall ever be a party-wall, unless it be of the heights and thicknesses

thicknesses above the footings, and of the materials, directed concerning party-walls.

Every wall built after 24th *June*, and every addition made to any party-wall, shall be carried up one foot six inches above the roof of the highest building which shall gable against such party-wall, in every part where such building shall gable thereto, measuring at a right angle with the back of the rafters of such roof; and every party-wall shall be carried up one foot above the gutters of the highest buildings, except the height shall exceed that of the parapet of either of the fronts abutting on the same, or adjoining thereto; in which case, the end only of every party-wall next such parapet may be less than one foot above the gutter, at the distance of two feet six inches from the front of such parapet; and if any dormer shall be fixed in the roof of any building, within four feet of any party-wall, then such party-wall shall be carried up against every dormer, and shall extend in breadth two feet wider, and to the height of every part of such dormer, within four feet of such party-wall: And no recess shall be made in a party-wall after built to any building of the first, second, third, or fourth class, (except chimnies, flues, girders, and beams, &c. as directed, so as to reduce such wall under the thickness required, to the highest class to which such party-wall belongs; And there shall be no opening after the 24th of *June*, made in any party-wall, except for the communication from one stack of warehouses to another, and from one stable building to another; all which communications shall have iron doors, in manner after directed;

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rected; and also except passages on the ground for foot passengers or carriages as may be necessary; all which passages shall be arched with brick, or brick and stone together, of the thickness of thirteen inches in the first and second class, and of the thickness of eight inches and an half in every building of the third or fourth class: And if there be any cellar under any passage, it shall be arched over with brick or stone, as the passage over such cellar is directed to be arched.

No timbers shall, after the 24th June, be laid into any party-arch, except for bond to the same, nor into a party-wall, other than templets and bond-timbers necessary for the same; and other than ends of girders or trimming joists, or of other principal timbers; all which timbers shall have eight inches and an half of solid brick-work between the ends and sides of every such piece of timber, and the timber of any building adjoining thereto; and the end of every girder, &c. or trimming joist and other piece of timber, may be laid beyond the centre of any party-wall hereafter to be built, so as there be left eight inches and an half of solid brick at the end of every piece of timber, except in places where part of the ends of such timber lies opposite to the ends of any timber of an adjoining building, in which case, no part of such timber shall approach nearer than four inches to the centre of the said wall.

No person shall cut any party-arch, nor the shaft of a chimney on a party-wall, for any purpose whatsoever; and no person shall cut a party-wall

wall, other than for the purposes mentioned; viz. When the front or back wall of a house is in a line with the front or back wall of the house adjoining thereto shall at any time be built, a break not more than nine inches deep from the external face of such front or back wall to the centre of such wall may be made for inserting therein the end of such new front; and where a bressummer and story-posts, shall be fixed in the ground story of such new front or back wall, such break may be cut from the foundation of such new front to the top of such bressummer, fourteen inches deep from the face of such front, and may be four inches wide in the cellar story, and two inches wide in the ground story, for the placing therein story-posts, agreeable to the directions of the act; and may cut into a party-wall for tailing in stone steps or landings, or placing in timbers for bearers to wood stairs, so as no bearer be laid into a party-wall nearer than eight inches and an half to any chimney, or to any timber of an adjoining house, or nearer than four inches to the internal finishing of such adjoining house; and for laying therein stone corbels for the support of chimney jambs, girders, beams, purlings, binding or trimming joists; and may cut perpendicular recesses into any party-wall, not less than thirteen inches thick, for inserting walls and piers therein, so as that no such recess be more than fifteen inches wide, or four inches deep, and no nearer than ten feet to any other recess; and may cut off the footing on the side of a party-wall where the adjoining buildings shall be rebuilt with a wall against such party-wall; but every person who shall cut

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into any party-wall for the purposes aforesaid shall immediately make good, and effectually pin up with brick, &c. bedded in mortar, every defect occasioned by cutting of such party-wall; and no party-wall shall be cut, if the cutting thereof endanger the timbers, chimnies, or internal finishings of the adjoining buildings.

The back of every chimney in every party-wall which shall, after the 24th of *June*, be built, shall be thirteen inches thick in the cellar story, and eight inches and an half thick in every other story from the hearth to the height of twelve inches above the mantle in every chimney; and no chimney, after the 24th of *June*, of the first class, shall be built with the back thereof against the back of any other chimney, unless the back of each chimney in the cellar story be eight and an half, and the back of each chimney in the upper stories be four inches and a quarter from the centre of such party-wall: And no chimney, after the 24th of *June*, in any party-wall, where the building adjoining is of the second, third, or fourth class, shall be built with the back thereof against the back of any other chimney, unless the back of each chimney in the cellar story be six inches and an half, and the back of each chimney in the upper stories be four inches and a quarter from the centre of such wall: And no flue shall be built opposite to another in a party-wall, unless the back of each flue be two inches from the centre of such party-wall: The breast of each flue, after the 24th of *June*, built, whether in a party-wall or not, shall be of brick eight inches and an half thick in every cellar story, and four inches thick in every other story: All par-

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titions between flues, after the 24th of *June*, shall be of brick, &c. and every partition shall be half a brick thick: And every breast and back of chimnies, and breast, back, and partition of a flue hereafter built, shall be pargetted within and without, except the outside be next to vacant ground, the back of every chimney and flue near such vacant ground shall be in some durable manner, marked, except in a fore-front, back-front, or side-front of any other building not to be built against; and every back of such chimney and flue against such vacant ground shall be pargetted as soon as any building shall be erected to such wall.

If any persons possessed of any ground whereon a party-wall is to be built, be desirous of having chimney-jambs, breasts, and flues, made in such party-wall on their part thereof, or of having a recess left of the breadths and depths in and by the act allowed, for inserting therein external or internal walls, or for other purposes allowed by the act, and of such desire shall give notice in writing under their hands, describing every chimney-jamb, &c. and every recess, to the builder, at any time before such party-wall shall be begun to be built; then such builder shall erect, in a substantial manner, so many chimney-jambs, &c. in such parts of every party-wall as shall be, by the persons giving notice, required; and leave recesses in every party-wall, according to the regulations by the act prescribed: And after erecting the jambs, &c. required, the persons giving notice, or their executors, &c. shall be deemed to have made use of such party-wall, and shall be liable to pay the whole expence of erect-
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ing such jambs, &c. and also such part of the expence of erecting such wall, as directed concerning party-walls built after the 24th of June, to be recovered in like manner as any proportion of a party-wall is by the act made recoverable by the builder thereof, from any other person liable to contribute thereto.

When any building built over a publick way, or any building, having rooms the property of different persons, and intermixed, shall be rebuilt, there shall be a party-wall, according to the directions therein contained for the highest class adjoining thereto, with a party-arch of the thickness of thirteen inches, in every building of the first and second class, and of the thickness of eight inches and an half, in every third and fourth rate of building, between house and house, or between the different rooms, the property of different persons.

The last mentioned clause relating to buildings in part over publick ways, or having rooms the property of different persons, shall not extend to any of the rooms in *Serjeant's Inn* in *Chancery-lane*, or any of the four inns of court, or to any of the inns of chancery, or other inns for the study of the law; except the walls between the rooms in such inns, belonging to and communicating with each separate stair-case, shall be deemed party-walls within the act, and shall be subject to the regulations relating to other party-walls within the limits aforesaid.

When any owner of any house built over any publick way shall be desirous of rebuilding such house, and the owner of the adjoining building shall not be willing, by reason of some legal disability,

ability, to join in such rebuilding, then the party desirous of rebuilding shall give notice, in writing, to the owner of such adjoining house or other intermixed building, that he will apply to the mayor and aldermen of the city of *London* when such part thereof is situated within the city or liberties, or to the justices of *Middlesex* or *Surrey*, or for the liberty of the *Tower*, within whose jurisdiction such house, or part thereof, is situated, in their sessions of the peace, to be next holden, after fourteen days from the delivery of such notice, to obtain the judgment of the courts touching the rebuilding such house, of such party-walls or arches, described in such notice, and for ascertaining the scite of party-walls, or the situation of party-arches, according to the directions in the act contained, by delivering a true copy of such notice to the owner of such adjoining house, or of the other intermixed buildings; or if such owner be under the disability of coverture, infancy, idiocy, or lunacy, then to the husband of such owner under coverture, or guardians, trustees of owners under the disability of infancy, &c. by leaving the same at their usual place of abode, or by delivering a true copy to the tenant of such adjoining house, or intermixed building; or if such house be uninhabited, by fixing such copy upon the door of such adjoining or intermixed building uninhabited; and in every such case, the court of mayor and aldermen, and the court of sessions, upon application to them by the party desirous to rebuild, and upon proof of notice given, may issue their warrants to the sheriffs of *London* or of *Middlesex* or *Surrey*, or the *Tower*, requiring them to return a competent
number

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number of disinterested persons to serve on juries, within the distance to which they are summoned, not less than twenty-four, nor more than thirty-six; and out of such persons, a jury of twelve persons shall be drawn by the said court appointed, in such manner as juries are drawn by the trial of issues joined in his Majesty's courts of record at *Westminster*, by an act made 3 Geo. II. (intituled, *An act for the better regulation of juries*); which persons, so summoned, are to appear before the said courts, at such time and place as in such warrant shall be appointed, and to attend until discharged by the court: And all parties shall have their lawful challenges against any of the jury, but shall not challenge the array: And the said courts are to call before them all persons proper to be examined as witnesses, on oath, concerning the premises; and either of the said courts, if they think fit, may order the jury to view the place in question, and command such jury, witnesses, and parties to attend, until all affairs for which they are summoned shall be concluded; and the jury, upon their oaths, (which oaths, and oaths to persons called to give evidence, the said courts are to administer), shall try, and determine by their verdict, whether the premises ought to be rebuilt or not; and if they ought to be rebuilt, shall determine the scite of party-walls, and also what party-arches may be necessary over or under any rooms of houses to be rebuilt, or ascertain the quantity of the soil or other parts of the premises necessary to be laid to or taken from the house of the person desirous to rebuild, permitting such person to erect a party-wall or party-arches;

and shall award what compensation should be made by either of the parties to the other, in lieu of lessening the said houses by such party-wall or party-arches, or as a satisfaction for such injury as shall be done to either of the parties; and shall also ascertain what proportion of the expence of building such party-wall or party-arches shall be repaid by either of the parties to the person so rebuilding: And the said courts shall give judgment according to such verdict, as well for determining the scite of such party-wall or party-arches, as also for such sums assessed by the said jury, and likewise for such proportion of expence of building such party-wall or party-arches, awarded by the jury, to be repaid to the person who shall have rebuilt the same; and shall award to either of the parties such costs as they shall deem reasonable; which verdict, and judgment thereupon, shall be conclusive against all persons, &c. claiming estate, right, or interest, in or out of the said premises, either in possession, reversion or expectancy, as also against the King's most excellent Majesty, his heirs, &c. and against infants and issue unborn, persons in reversion, lunaticks, idiots, and femmes-covert, and persons under any legal incapacity, and against all trustees and cestuique trusts, and their successors, &c. And all verdicts and determinations of the said courts pronounced, shall be, by the clerk of the city of *London*, or by the clerk of the peace for the county of *Middlesex* or *Surrey*, or the city and liberty of *Westminster*, or the proper officer of the liberty of the *Tower of London*, entered and filed as of record of the said courts where such proceedings shall have been had, (for the entry-
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and filing whereof, and for every order of court, and copy thereof, the said clerks, or proper officer, shall be paid 12 *d.* for every 100 words, and no more); and each of the said clerks is required to deliver to any person requiring the same an exemplification, under his hand and seal, of such verdict and determination, paying 12 *d.* for every 100 words; and every exemplification may be read as evidence in all courts of law and equity whatever: And after the expiration of fourteen days from the obtaining such judgment and payment, in manner directed, of the sums thereby awarded, or, where no money shall be awarded, after fourteen days from obtaining such judgment, the person who shall have applied for and obtained such judgment, his heirs, &c. or workmen, may pull down his own house, and rebuild the same, in manner ascertained by such judgment; and may, in presence of a constable or headborough, &c. after the end of fourteen days after judgment obtained, enter upon the scite of ground for a party-wall or party-arches, and into the other building adjoining to the house or party-wall or party-arches, to be rebuilt, at any time between six in the morning and seven in the afternoon, (*Sundays* excepted); and if the outer door of such house be shut, and the occupier refuse to open, being required, or if such house be empty, may break open such outer door, and remove to the premises, or if there is no room sufficient for that purpose, to any other place, any goods, &c. obstructing the building of such party-wall, &c. or the pulling down any wall, or other thing necessary to be removed; and after such entry, the builders may erect such party-wall or party-arches, and their

servants may enter into and abide therein the usual times of working, for shoring up the said house, and for taking down party-walls necessary to be removed: And if any such owner, or other person, shall hinder any workmen employed for the purposes aforesaid, or damage the said works, every such owner shall, for every such offence, forfeit 10*l.*; to be levied and applied as the several penalties are directed to be levied and applied.

Within ten days after such party-wall or party-arches shall be built, the person who shall have rebuilt the same, or his executors, &c. shall leave a true account of the expence of the same with the party so awarded by the jury, to contribute to the expence thereof, or at his usual place of abode; or if such party be under coverture, to her husband; or if infants, idiots, or lunaticks, to their guardians or trustees; or in case of a body corporate being so awarded to contribute, then to the mayor or officer of such corporation; who shall pay to the person who rebuilt such party-wall or party-arches, &c. or his executors, &c. the expence of building the same so awarded by the jury, within twenty-one days after demand; or if the same be not paid, the tenant of the house chargeable therewith may pay the same, and deduct the money out of the next rent due to the owner of such house; or the same may be recovered from the party so awarded to pay, by action of debt, &c. or information, in any court of record at *Westminster*, with double costs of suit.

All the powers by the act vested in the court of Mayor and aldermen of *London*, may be exercised

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exercised by the court holden in the outer chamber of the guildhall, according to the custom of the city.

Upon application to the general sessions of the peace for the county of *Surrey*, concerning any matter to be by such sessions ordered in pursuance of the act, the jury and all parties required to attend the sessions, pursuant to such application, shall be impanelled and required to attend at some general adjournment of the said sessions, within six weeks after such application; which adjournment shall be to some place in the borough of *Southwark*, appointed by the justices in the said sessions; and every further meeting of the said sessions, upon such application, shall be appointed within three weeks from the last meeting; which adjournment the justices for the county of *Surrey* are required to make and hold, from time to time.

The court of mayor and aldermen, or either of the aforesaid sessions, may impose a reasonable fine on any of the sheriffs or their deputies, making default in the premises, and on any persons summoned and returned on such jury, and shall not appear at the time and place in such summons specified, or, appearing, refuse to be sworn on such jury, or to give their verdict, or wilfully neglecting their duty therein, contrary to the true meaning of the act; and on persons having notice to attend to give evidence, who shall not attend, or attending refuse to be sworn and give evidence; and in default of payment thereof on demand, to levy such fine in manner as other fines set by the said courts are levied, so that no fine shall exceed 10*l.* upon one person for one offence; and such fine, when received, shall be

applied to the use of the person so applying to the court of mayor and aldermen, or courts of sessions, and to no other use whatsoever; and if such person, having notice to attend and give evidence, shall not attend and give evidence, having had ten days previous notice in writing, under the hand of the party on whose behalf such evidence shall be wanted, his guardian, trustee, or agent, and having been tendered his reasonable charges for such attendance, he, so neglecting or refusing to give evidence, shall be liable to an action to be brought against him by the party on whose behalf such notice shall be given; in which the plaintiff shall recover the damages occasioned by such non-attendance, with costs; and no other excuse shall be allowed for non-attendance than by law allowable for non-attendance of witnesses legally summoned to give evidence on trials of issues joined in any court of record at *Westminster*: Provided, the court, where such witness shall appear, may (if they think fit) order such further sum to be paid to witnesses for their attendance on such courts, as to them shall seem reasonable, in proportion to the time such witnesses attend; and witnesses shall not be compelled to give evidence before such further sum ordered shall be paid to them.

And whereas it may happen that party-walls or party-arches, or party-fence-walls, built or to be built within the limits aforesaid, may be defective, or so far out of repair as to render it necessary to pull down and rebuild the same, or some part or parts thereof, as well when both or either of the adjoining houses or other buildings may not require to be rebuilt, as when the said houses or buildings, or one of them, may require

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to be rebuilt; be it enacted, That from and after the 24th of June, every owner of any house within the limits aforesaid, who shall think it necessary to repair any party-wall, &c. or part thereof, between any such house, or the ground adjoining, and the next adjoining house or the ground adjoining, (if the owner of such adjoining house, or ground, will not, or, by reason of legal disability, cannot agree to repair the same), shall give three months notice to the owner, or if such owner be under coverture to her husband, or if under the disability of infancy, idiocy, or lunacy, to the guardians or trustees of such infant, idiot, or lunatick, or to the occupier of such adjoining house or ground, of such his intencion to repair such party-wall or party fence-wall, by delivering a copy of such notice to such owner, or by leaving it at his usual place of abode; or if such house be unoccupied, by fixing such notice on the door of such house; which notice shall be to the effect following:

APPREHENDING the party-wall, party-arch, or party fence-wall; or some part thereof, (as the case shall be), between the house or building, or ground (as the case shall be) thereto adjoining, situated
 ————— inhabited or occupied by —————
 and my house or building, or ground (as the case shall be) adjoining thereto, to be so far out of repair as to render it necessary to repair or pull down and rebuild the same, or some part thereof: Take notice, that I intend to have the said party-wall, party-arch, or party fence-wall, (as the case shall be) surveyed, pursuant to an act of parliament made in the fourteenth year of the reign of King George the Third, and that I have appointed ————— of

_____ my surveyors, to meet at _____
 in _____ (being at some place within
 the limits aforesaid), on my behalf, on the _____
 day of _____ next, at _____ of the clock in
 the _____ of the same day; (being be-
 tween the hours of six in the morning and six in
 the afternoon): And I do hereby require and call
 upon you to appoint two other surveyors or able work-
 men on your part, to meet them at the time and place
 aforesaid, to view the said party-wall, party-arch,
 or party fence-wall, (as the case shall be), and to
 certify the state and condition thereof, and whether
 the same or any part thereof, ought to be repaired or
 pulled down and rebuilt. Dated this _____ day of _____

In case such owner be under any disability, as
 aforesaid, such person, or the occupier to whom
 such notice shall be given, shall appoint two sur-
 veyors or able-workmen to meet at the time and
 place in such notice mentioned; and they, with
 the surveyors or workmen named by the party
 giving such notice, and whose names shall be ex-
 pressed in such notice, may view such party-
 wall, party-arch, or party fence-wall, and cer-
 tify the condition thereof, and whether the same
 ought to be repaired or rebuilt; and such survey-
 ors may, within six days after the time appointed
 in such notice, view the party-wall, party-arch,
 or party fence-wall, intended to be repaired or
 pulled down, and shall certify, in writing under
 their hands, to the court of mayor and aldermen,
 or to the justices of the peace in their next ge-
 neral or quarter sessions, (as the case may be) the
 state of such party-wall, party-arch, or party
 fence-

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fence-wall, and whether the same ought to be repaired, or pulled down and rebuilt: And in case the major part of the surveyors do not certify within one month, another surveyor is to be named by a justice; and if the walls are certified by the surveyors to be ruinous, a copy of the certificate is to be delivered to the owners, in three days: And such owners thinking themselves aggrieved may appeal to the general quarter sessions; whose determination shall be final: And, on default of appealing, or if, upon any appeal, there be no order made to the contrary, the party intending to repair, or pull down and rebuild, such party-wall, party-arch, or party fence-wall, after the expiration of fourteen days after delivering or leaving the copy of such certificate, as aforesaid, or after the determination of such appeal, may cause such party-wall, party-arch, or party fence-wall, or any parts thereof, to be repaired or pulled down, and have the like power of entry into the adjoining houses or buildings, or of breaking open the same, in the presence of a peace-officer, in case the same be unoccupied, or be refused to be opened; and of removing wainscot, shelves, furniture, and things, and of shoring up the adjoining houses or buildings, as is allowed to the owners of intermixed houses by the act; and may erect new party-walls or party-arches, of such materials, and of such thickness and height, and in such manner, and subject to such restrictions and directions as are by the act prescribed.

All owners of houses of the first, second, and third class, shall give three months notice in writing before pulling down old party-walls,

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All the owners of houses and buildings having partitions of wood, may give three months notice to owners of adjoining houses of their design to pull down the same, &c. and afterwards may pull down the said partitions, remove furniture, &c. as before directed.

The persons at whose expence any party-wall or party-arch shall be built agreeably to the directions of the act, shall be reimbursed by the owners who shall be intitled to the improved rent of the adjoining building or ground, and who shall at any time make use of such party-wall or party-arch, a part of the expence of building the same, in the proportion after mentioned; *viz.* If the adjoining building be of the same rate or class of building as, or superior to, the building belonging to the person at whose expence the party-wall was built, then the owner of such adjoining building shall pay one moiety of the expence of building so much of the party-wall or party-arch as such owner shall make use of; and if the adjoining building be of an inferior class, then the owner of such adjoining building or ground shall pay a sum equal to one moiety of the expence of building a party-wall or party-arch of the thickness required for the class whereof such adjoining building shall be, and of the height and breadth of so much of the party-wall or party-arch as such owner shall make use of, and until payment of the expence, the property of the party-wall or party-arch is vested in the builder: And such moiety or proportional part of the expence of building such party-wall or party-arch shall be so paid to the person at whose expence the same shall be built,

or

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or in whom the property shall be vested at the times after mentioned; i. e. in respect of every such party-wall to a house or building whereunto, at the time of building the same, no other house or building was adjoining, so soon as such party-wall shall be first cut into or made use of; and in respect of every such party-wall or party-arch as shall be built against, or adjoining to, any other house or building, so soon as such party-wall or party-arch shall be completely built and finished: And in respect of such last mentioned party-wall or party-arch, the owner of such adjoining house shall, together with such proportional part of the expence of building such party-wall, also pay a like proportional part of the expences necessary to the pulling down the old party-wall, or timber or wood partition, and the whole of the reasonable expences of shoring up such adjoining building, and of removing goods, furniture, or things, and of pulling down any wainscot or partition, and also all such costs, if any, as may have been awarded by the court of mayor and aldermen, or court of sessions as aforesaid; but not any part of the expence of pulling down and clearing away such old party-wall, party-arch, or partition, if such there was: And it is directed, that the expence of building such party-wall or party-arch shall be estimated after the rate of 7*l.* 15*s.* by the rod, for the new brick-work, deducting thereout after the rate of 28*s.* by the rod for the materials (if any) of so much of the old wall or arch as did belong to such adjoining building or ground, and also after the rate of 2*l.* by the cubical-foot for the materials (if any) of so much of the old timber partition as did belong

long to such adjoining building or ground: And within ten days after the party-wall is finished, an account to be left with the owner of adjoining buildings what he is liable to pay: And in case the same be not paid within twenty-one days next after demand thereof, then the same shall and may be recovered, together with full costs of suit, from such owner, by action of debt, or on the case, in any court of record at *Westminster*, wherein no essoin, protection, or wager of law, or more than one imparlance, shall be allowed: And if the plaintiff before action gives three months notice, and recovers his whole charge, he shall be intitled to double costs.

All party-walls shall be such as are required for the highest rate of building adjoining, and shall not be of less thickness; and they may be raised by the owner of one side: And if the owner of the other side make use of it, he must contribute to the expence: And all party fence-walls may be raised by the owner of one side, but are not to be used as a party-wall unless of sufficient thickness and height. The owner of one side may take down a party fence-wall, and build a party-wall: And if the owner of the other side uses it other than as a party fence-wall, he must contribute to the expence.

The first builder is not to lose any right of soil on account of a party-wall not being half on each ground.

If the fore-front and back-front of a building shall, after the 24th of *June*, be rebuilt as low as the *breffsummer*, or one pair of stairs floor,

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floor, within five years of each other, the party-walls of every such building shall, from thenceforth, be subject to the regulations contained concerning party-walls of houses to be built after the 24th of June: And for further prevention of fire, the back of every chimney to be built after the 24th of June, in any building of the first class, not being in a party-wall, shall be in the cellar-story at least thirteen inches thick from the hearth to the height of twelve inches above the mantle; and shall be at least eight inches and an half thick from the hearth to the height of twelve inches above the mantle in every other story, except where any such chimney shall be built against a wall, in which case the back of every such chimney, from the hearth to the height of twelve inches above the mantle, may be half a brick thinner: And the back of every chimney to be built in any building of the second, third, or fourth class, not being in a party-wall, shall be in every story at least eight inches and an half thick, from the hearth to the height of twelve inches above the mantle, except where such chimney shall be built against a wall, in which case the back of every such chimney from the hearth to the height of twelve inches above the mantle may be half a brick thinner: And there shall be no timber over the opening of the chimney, to be built after the time aforesaid, for supporting the breast of such chimney; but there shall be an arch of brick or stone, or an iron bar over the opening of every such chimney, to support the breast thereof: And the timber under the hearth must be eighteen inches lower: The hearth must also be laid on brick

brick or stone, or on the ground, with slabs before the hearths, and brick trimmers under them : And no timber or wood work is to be put in the brickwork of ovens, coppers, &c. : The distance of timber laid in the brickwork of chimnies is to be nine, and in stoves, five inches : All the wood work on the front of chimnies is to be fixed by iron nails, and no chimney is to be erected on timber.

Every external wall or inclosure of the first, second, third, or fourth class, which shall be erected after the 24th of *June*, and of every enlargement thereafter to be made to any building of the first, second, third, or fourth class, to be erected, shall be of brick, stone, artificial stone, lead, copper, tin, slate, tile, or iron, together, except the necessary piling, bridging, and plank-ing, for the foundation, and except the necessary templets, chains, bond-timbers, and the doors, sashes, window-shutters, and door and window-frames to such buildings, and the tiers or stories of door-cases and doors to all such warehouses as are of the first, second, third, or fourth class ; all which window and door frames shall be set in reveals, and recessed at least four inches from the front of the building ; and except the bressummers, story-posts, and plates, which may be made on the ground-story only ; and all stall-boards for the conveniency of shops, which may be made on the ground-story only ; which bressummers, story-posts, and plates, and the stories of door-cases and doors, are not hereby required to be fixed in reveals ; but no story-posts and bressummers are to be fixed more than two inches in party-walls : And all corner
story-

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story-posts to be of oak or stone, and twelve inches square.

Every flat, gutter, and roof, of the first, second, third, fourth, or fifth class of building, which shall be built after the 24th of June, and every turret, dormer, lanthorn light, or other erection, placed in the flat or roof of such building, and every external part of any flat, gutter, roof, turret, dormer, and lanthorn uncovered, shall be covered with glass, copper, lead, tin, plate, tile, or artificial stone; except the doors, door-frames, windows, and window-frames, of such dormers, turrets, lanthorn lights, or other erections.

Every coping, cornice, fascia, window-dressing, portico, balcony, balustrade, external decoration or projection, made to any building of the first, second, third, or fourth class, and also every frontispiece to a building of the first class, or to any addition of such buildings, shall externally be of brick, stone, burnt clay, or artificial stone, stucco, lead, or iron; except the cornices and dressings to shop-windows; and except such covered ways as may be made to any building, so as the covered way shall not extend beyond the original line of the houses in the street or way in which the same is erected; and such covered way shall be covered with stone, lead, copper, slate, tile, or tin; and neither the covered way, nor the cornice to any shop-window, nor the roof of any such portico, shall be higher than the under side of the sill of the window-frame of the one pair of stairs window of the building to which the same belongs: And

no water shall be suffered to drip next to any publick street, square, place, court, or way, from the roof of any building of the first, second, third, or fourth class, except from the roofs of porticoes; but all water from such roofs shall be conveyed by lead, copper, tin, or iron gutters or pipes, or all of them, or by wooden trunks, or brick or stone funnels, to the drains made, on or before the surface of the ground, for that purpose, or to some cistern or reservoir made to receive the same, or to any front of such building not abutting upon any publick street; and no such brick or stone funnel shall be made or built, unless in every part thereof below the surface of the foot pavement before the same; nor shall any such wooden trunk, after the said time, be fixed, unless the same be, in every part thereof, below the tops of the windows of the ground story.

No bow-windows are to be built extending beyond the line of the street, except projections for decorations, shop-windows, and stall-boards.

Nothing contained shall prejudice or defeat the powers granted to commissioners for paving streets within the limits aforesaid, or to the commissioners of the sewers for the city of *London*.

Every external wall, or other inclosure, to any building, built, or begun to be built, before the 24th of *June*, not being of the materials by the act required for external walls or inclosures to be built, may be at all times repaired with the same materials as those of which such external wall or inclosure is erected, (except inclosures of roofs, flats, gutters, and of dormers, turrets, lanthorn lights, or erections on the same, which

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which shall be repaired with the materials before directed;) but in case such external wall or inclosure be at any time taken down, or demolished to the bressummer or one pair of stairs floor, or the place where the bressummer is fixed, then every part of the same, not being built of the materials required for external walls, or inclosures, to be erected, shall be taken down, and the same shall be rebuilt of such materials, and in such manner, as by the act required for all external walls or inclosures, to be built, according to the class of buildings to which such wall or external inclosure belongs.

No bow-window or projection shall be rebuilt, unless so originally built, or within the line of the street, &c.

No stack of warehouses shall be above thirty-five squares including internal and external walls; nor shall any communication through party-walls be allowed, unless by stone door-cases and iron doors; nor shall timber be laid within eighteen inches of such doors.

No stables shall contain more than twenty-five squares of building, including internal and external walls, and so much of the party-walls as belong thereto; and no enlargement shall be made, so as to encrease beyond twenty-five squares, except such stables be divided by party-walls, built according to the directions before contained: And no communication shall be made through a party-wall, unless the door-cases and sills be of stone, and a door of wrought iron one fourth of an inch thick in the pannels; and no timber, bond, or lintel, without having
cases,

cases, &c. shall be put into the brick wall nearer than eighteen inches to such communication.

If buildings of the first, second, third, or fourth class, (except in the inns of courts or chantery, the *Royal Exchange*, companies halls, warehouses and dwelling-houses let for not more than 25*l.* a year,) be hereafter converted into two or more dwelling-houses, or other buildings, in distinct tenures on the ground-floor, each tenement shall be considered as a separate building, and shall be divided by party-walls; and every party-wall shall be of the materials, height, and thickness, and under the regulations directed to be observed with respect to the party-walls of the highest class of building adjoining to party-walls.

Proprietors or leaseholders may divide warehouses for the conveniency of letting the same to under-tenants; so as any stack of warehouses containing more than thirty-five squares of building on the ground plan, shall be divided by party-walls into divisions not more than thirty-five squares each, as is before directed.

Proprietors or leaseholders of stable-yards, or livery stables, may divide them for letting the same to under-tenants; so as any building containing more than twenty-five squares on the ground plan shall be divided by party-walls into divisions not more than twenty-five squares each, as before directed.

All buildings of the fifth and sixth rates, in distinct tenures, and not at the requisite distances, shall be deemed publick nuisances.

No funnel for conveying smoke shall be fixed next a publick street, &c. on the front of buildings

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ings of the first, second, third, or fourth class of building ; nor on the inside of such building nearer than fourteen inches to timber, or other combustible material ; nor shall any brick funnel built on the outside of any front next to a publick street, &c. of buildings of the first, second, third, or fourth class, extend beyond the general line of houses in the publick street, &c.

Every church, dwelling-house, or wall, shall be built pursuant to the rules, and with the materials, particularly appointed ; and if any persons build contrary to the said rules, and be thereof convicted by the oaths of two or more credible witnesses before the mayor of *London*, or two justices where such building shall be situated, then the said building or wall shall be deemed a common nuisance, and the builder and owner, or one of them, as the mayor or justices may require, shall enter into a recognizance in such sum as they shall appoint for abating and demolishing the same, within a convenient time ; or to amend the same according to the rules before contained : And in default of such recognizance, the offender shall be committed to the common gaol where the offence shall be committed, there to remain, without bail, until he have abated demolished, or amended, the same ; or until such irregular building be abated or demolished by order of the mayor or justices ; provided always that such conviction be within three months after such building shall be finished.

Buildings deemed nuisances shall be taken down by order of the mayor of *London* or any two justices of the cities of *London* or *Westminster*;

ster, or counties of *Middlesex* or *Surrey*, or within the liberty of the *Tower of London*, who may sell the materials to defray the expence; the surplus to be returned to the owners, or the deficiency to be made good out of their other effects.

The court of aldermen of *London* may appoint discreet persons, skilled in the art of building, during their pleasure, to see the said regulations well observed throughout the city of *London*, and the liberties thereof: And the said court are required to administer to the said surveyors an oath for the impartial execution of their office; and to appoint the districts under their respective surveys: And the justices for *Middlesex* and *Surrey*, the city of *Westminster*, and the liberty of the *Tower of London*, in their general quarter sessions are required, within their respective jurisdictions, to appoint persons qualified as above, during their pleasure, to see the said regulations well observed throughout the several parishes, &c. aforesaid, within the jurisdiction of the respective quarter sessions: And the justices shall administer to the said surveyors an oath for the impartial execution of their office, and shall appoint the districts under their respective surveys; which oath shall be in the form, or to the effect following, viz.

I A.B. being one of the surveyors or supervisors appointed in pursuance of an act of parliament, passed in the fourteenth year of the reign of King George the Third, "For the further and better regulation of buildings and party-walls; and for the
"more effectually preventing mischiefs by fire within
"the cities of London and Westminster, and the
"liberties

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"liberties thereof, and other the parishes, precincts,
 "and places, within the weekly bills of mortality,
 "the parishes of Saint Mary-le-bon, Padding-
 "ton, Saint Pancras, and Saint Luke at Chel-
 "sea, in the county of Middlesex; and for indem-
 "nifying, under certain conditions, builders, and
 "other persons, against the penalties to which they
 "are or may be liable for erecting buildings within
 "the limits aforesaid, contrary to law," do swear,
 That, upon receiving notice of any building or wall
 to be built, or other builders work to be done, within
 the district under my inspection, not being by illness or
 otherwise lawfully prevented, I will, diligently and
 faithfully, survey the same, and to the utmost of my
 abilities endeavour to cause the rules and regulations in
 the said act prescribed to be strictly observed; and
 that without favour or affection, prejudice or malice.

So help me G O D.

And such supervisor shall leave notice in writ-
 ing with the clerk for the county, city, or li-
 berty, in his district, of the place of his usual
 residence.

Before any building or wall shall be begun,
 the master, workman, &c. shall give twenty-
 four hours notice thereof to the surveyor within
 whose district the same shall be, who shall view
 the same, and see that all the rules in the act are
 truly observed; and he shall be paid by the mas-
 ter workman, or others causing such building or
 wall to be built, such money as a satisfaction for
 his trouble, as any two justices for the city,
 county, or liberty, in which such building is
 situate, shall, by a writing under their hands,
 appoint,

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appoint, not exceeding 3*l.* 10*s.* for every new building of the first rate; or 1*l.* 15*s.* for every first rate building to which any addition shall be made; and not exceeding 3*l.* 3*s.* for every new building of the second rate, or 1*l.* 10*s.* for every second rate building to which any addition shall be made; and not exceeding 2*l.* 10*s.* for every new building of the third rate, or 1*l.* 5*s.* for every third rate building to which any addition shall be made; and not exceeding 2*l.* 2*s.* for every new building of the fourth rate, or 1*l.* 1*s.* for every fourth rate building to which any addition shall be made; and not exceeding 1*l.* 10*s.* for every new building of the fifth rate, or 15*s.* for every fifth rate building to which any addition shall be made; and not exceeding 1*l.* 1*s.* for every new building of the sixth rate, or 10*s.* 6*d.* for every sixth rate building to which any addition shall be made; and not exceeding 10*s.* 6*d.* for every new building of the seventh rate, or 5*s.* for every seventh rate building to which any addition shall be made; and, in default of payment of any of the said money, or such other sums as the justices shall appoint, the same shall be levied by sale of the goods of such master workman, &c. with costs.

If any person begin such building or wall; or cut into any party-wall, without notice given to the surveyor, or refuse him admittance at reasonable hours, for viewing the same; every offender shall forfeit to the surveyor treble the satisfaction he would have been intitled to for his trouble in viewing the building, &c. and seeing the rules observed, in case notice had been given; and for every default, shall forfeit 20*l.*; to be

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recovered by an action, &c. in any court of record at *Westminster*, by any person who shall sue for the same; and every such house, &c. so begun, without notice, if not built agreeably to the regulations of the act, shall be demolished or amended by order of the mayor or justices.

The surveyor within whose district any building or wall is not begun according to the rules, shall give information thereof to the mayor of *London*, or to two justices within whose jurisdiction the same shall be; and they shall proceed to hear the master; and if any breach of the rules is found to be committed, they shall cause such irregular building or wall to be demolished or amended in manner before directed.

Workmen, servants, &c. causing any building or wall to be erected contrary to the directions of the act, upon conviction thereof before the mayor of *London*, or justices, upon the oath of one or more credible witnesses, or confession of the party, shall, for every offence, forfeit 30s. one moiety thereof to the poor of the parish, the other to the informer; and if that forfeiture be not paid immediately on conviction, the offender shall, by warrant of the mayor or justices, be committed to the house of correction, there to remain without bail, not more than three months, nor less than one month, unless the penalty be sooner paid.

Every master workman, &c. who shall build any house, &c. within fourteen days after such building is covered in, or party-wall finished, or the cutting into any party-wall made good, shall cause the same to be surveyed by the surveyor within whose district the same is situated; and

if the surveyor refuse, or by illness, or otherwise, be prevented, then the same shall be surveyed by any other supervisor appointed and sworn within the city, county, or liberty, wherein the work is situated; and if such supervisor shall find that the same is, to the best of his judgement and belief, built agreeably to the directions in the act, he shall within fourteen days after surveying the same, make oath before the mayor of *London*, or some justice within whose jurisdiction the building or wall is situated. And the affidavit shall be filed with the clerk of the peace for the county, &c. within ten days after the making thereof; and the clerk shall receive one shilling, and no more, for his trouble; and if any master workman, &c. neglect to cause such survey to be made and filed, he shall forfeit 10*l.*; and if such affidavit be not made and filed within one month after recovery of the penalty, such master workman, &c. shall forfeit 10*l.* and so *toties quoties* for every month, till the affidavit be made and filed; and the said penalties shall be recovered and applied as the penalty by the act to be inflicted on persons boiling larger quantities of turpentine than are allowed, in places not permitted by the act.

If any surveyor shall wilfully neglect his duty, and the same be made appear to the mayor, &c. or to the court by whom he was appointed, such surveyor shall be forthwith discharged from his office, and for ever after be incapable of being again appointed to the same.

Nothing in the act shall extend to the royal palaces, or to any house or building in the possession of either of their Majesties, their heirs and

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and successors, or employed for their Majesties use or service.

If any presentment shall be made by an inquest or grand jury in *London*, or by any annoyance jury of *Westminster*, or by the jury sworn at the court-leet held by the sheriff for any place, or by other jury or inquest, that any house or building is in a ruinous condition, the court of mayor and aldermen, in respect of any house within the city and liberties of *London*, or the churchwardens, &c. for the place in which such building is situated, (not being in the city of *London*,) are required, on notice of such presentment made, and a copy laid before them, to cause, with all convenient speed, a sufficient hoard to be put up for the safety of all passengers, and to cause notice in writing to be given to the persons interested therein, if they can be found; and if not, to cause notice to be affixed to the door, or other notorious part of such building, to repair or pull down the same, as the case may require, within fourteen days next ensuing: And if such person do not begin to repair or take down the same within the said fourteen days after notice as aforesaid, and complete such repairs, or take down the same as soon as the case will admit; then, oath being made before the mayor, or a justice, &c. of notice given, or affixed, the mayor and aldermen, out of the cash in the chamber of *London*, and every overseer of the poor, out of the monies in his hands, are required with all convenient speed, to cause such building, or so much thereof as the court, or overseers of the poor, find necessary for the safety of passengers, to be taken down

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and secured, in manner requisite; and to sell such of the materials as the mayor and aldermen, &c. shall judge expedient; and out of the monies arising by the sale to pay every person by them employed for all the charges of putting up such hoards, and of taking down and securing the building, and of selling the said materials, and shall account for the surplus (if any be) to the owner, upon personal demand thereof made; and if no demand be made of such overseers before others be appointed, then the overplus shall be added to the rates made for the poor of the parish, and accounted for as such.

The owners, or their executors or administrators, may, within six years, receive such overplus, ten days after demand; and the churchwardens shall pay the same out of monies raised for the poor, and shall be allowed payment thereof from the parishioners, or future overseers: And if the monies arising by such sale fall short, then such deficiency shall be paid by the owners, and if they refuse to pay, the deficiency may be levied by warrant of the mayor of *London*, or justices, &c. by sale of goods, &c. found: And if no owners can be met with, or shall not on demand pay the deficiency, and no sufficient distress of their goods can be had; persons who shall occupy the building, or ground where the same stood, shall pay and deduct the same out of the rent; and if they refuse, the same shall, by warrant as aforesaid, be levied by sale of the goods of any occupier of the premises, with costs, and the owners shall allow such occupier all deficiencies and charges which he shall pay,

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or which shall be recovered by sale, &c. out of the rent for the premises; and all money recovered for such building, within the city or liberties of *London*, shall be paid to the chamberlain of the city, and all money recovered, for building in any part not within the city, shall be paid to the churchwardens of the parish, where the building is situated.

After the 24th of *June*, 1774, no person shall distil or boil turpentine, or draw oil of turpentine and rosin by distilling turpentine, or boil oil and turpentine together, above ten gallons at one time, within the limits aforesaid, in any work-house nearer to other buildings than fifty feet, upon pain of forfeiting for each offence 100*l.*, which forfeitures may be recovered with treble costs in any court of record at *Westminster*, one moiety to the poor of the parish, and the other to the informer or prosecutor.

Persons employed in building or repairing ships, &c. near the river *Thames*, may boil or mix oil and other materials for paying of ships, &c.

The churchwardens of parishes and overseers of the poor of every precinct, &c. not having a churchwarden, within the limits aforesaid, shall fix, at the charge of the parish, &c. upon the pipes belonging to waterworks, stopblocks of wood, with a wood plug, or firecocks, to go into each pipe, and to be placed as the churchwardens, &c. shall direct; the top of each stopblock or fire plug shall be even with the pavement; that such plugs or firecocks may, in case of fire, be opened without loss of time in digging down to the pipes; and all churchwardens or overseers shall fix a mark on a house nearest to the

place where such stopblocks, plugs, or firecocks lie, and shall also keep a key in every house so marked, to open the stopblock, &c. and a pipe for the water to come out; and the stopblocks, &c. shall be kept in repair at the charge of the parish where they are placed, and the plugs by the owners of the pipes where they are fixed; and when the owners of waterworks shall remove the pipes, they shall at their own costs fix the same, or like stopblocks, plugs, and firecocks, upon every new pipe, to be placed where the churchwardens or overseers shall direct; and the key and pipe shall be removed to the house nearest to the place to which such stopblock, &c. is removed; and a like mark shall be fixed against every such house.

Every parish shall, from time to time, keep in good order, and in some publick place, a large engine, and an hand engine, to throw up water for extinguishing fires; and shall keep one leather pipe, with a socket of the same size as the plug or firecock, and a suction-pipe, that the socket may be put into the pipe, to convey the water without loss, and without the help of buckets, into the engine; and shall also keep in some publick place within each parish three or more ladders, of one, two and three story high, to assist persons in houses on fire to escape; and in default of fixing and continuing such firecocks on the pipes, as also of keeping in good repair such large engine, hand engine, and leather pipes, socket and suction-pipe, and such ladders, every churchwarden, &c. making default in the premises, and being convicted before two justices, shall forfeit ten pounds, one moiety

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ty to the informer, and the other to the surveyor of the district; to be levied by sale of the goods of such churchwardens.

The turncock from whose waterwork water shall first come into the pipe where a plug shall be opened, shall be paid a sum not exceeding 10s. by the churchwardens or overseers of the parish, where fire may happen; and the engine-keeper who first brings a large engine, to help to extinguish fire, if complete, with a socket, hose, leather-pipe, and suction-pipe, shall be paid a sum not exceeding 30s.; the keeper of the second large engine, which shall be next brought and so complete, shall be paid a sum not exceeding 20s. and the keeper of any large engine, which shall be the third brought, and so complete, shall be paid a sum not exceeding 10s.; such payment to be made by the churchwardens, &c. where fire shall happen; and in default of payment, such reward shall be levied by distress and sale of the goods of such churchwarden and overseer, in manner as the penalty of 10l. is before directed to be recovered.

No reward shall be paid without the approbation of the alderman wherein such parish is situate, or of two of the common councilmen of the ward, if fire happens within the city or liberties of *London*, or without the approbation of one or more justices for *Middlesex*, or *Surrey*, residing within the parish, &c. where such fire happens; and if no justices reside in such parish, then of justices residing near the place, if fire happens out of the city of *London* and liberties thereof.

Where rewards are payable for fire occasioned by the taking fire of any chimney only, the occupiers of any room to which such chimney belongs, or holder of any house of which such room is part, or, if such chimney belong not to any lodger, then the tenant of the house wherein fire first begins shall repay to the churchwarden or overseer all such rewards or payments, by them made, or such part thereof, as the mayor or other justice upon the complaint of the churchwarden or overseer, and hearing the parties complained against, shall award and direct: And that the mayor, or other justice may be the better enabled to award and direct what may be just and reasonable, the said mayor and such justice may summon the parties complained against, and all persons fit to give evidence touching the premises, and may examine them upon oath; and if the party complained against do not appear, the mayor and such justice shall examine the matter of the complaint, and the evidence produced, and make such award as shall be just, and as if the party not appearing had been present, and heard in his defence; and if any sums so awarded to be repaid to such churchwarden, &c. be not repaid within fourteen days after demand, every such churchwarden, &c. by warrant from the mayor, or other justice, may levy such recompence so to be paid by distress and sale of the goods of the party making default of payment, or of any goods found in the apartment to which the chimney where such fire began belongs, or in part of the house whereof such room is part.

As

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As several parishes in the city of London were, after the great fire in 1666, united together, it is enacted, That any two or more of the parishes so united shall, for the purposes of the act, be deemed one parish only.

Large parishes may have more than one large engine, to be provided at the charge of the parish, and under the regulations and encouragements of the act.

The churchwardens and overseers of the poor may, with the consent of the major part of the inhabitants assembled in the vestry of each parish, pay the expences of the fire engines, and all necessary implements, rewards, &c. out of the poor's rates.

The watermen retained by the insurance office within the limits aforesaid, not exceeding thirty for each office, shall not be liable to be compelled to serve as mariners, or soldiers, their names and places of abode being to be registered in the admiralty office.

The governors of the several offices for insuring houses, &c. against fire are authorised upon request of any persons interested in houses which may be burnt down, or damaged by fire, or upon any grounds of suspicion that the owners, occupiers, or other persons who have insured such houses, &c. have been guilty of fraud, or of wilfully setting their houses on fire, to cause the insurance money to be expended towards rebuilding houses so burnt down, or damaged; unless the parties shall, within sixty days after their claim is adjusted, give security to the insurance office, that the insurance money shall be laid out as aforesaid; or unless the said insurance money

shall be, in that time, disposed of amongst all the contending parties, to the approbation of the governors of such insurance office.

If servants, through negligence, shall fire any building in *Britain*, such servants, being convicted by the oath of witnesses before two justices, shall forfeit 100*l.* to the churchwardens where such fire shall happen; to be distributed amongst the sufferers, in such proportions, as to the churchwardens shall seem just: And in case of refusal to pay, servants shall, by warrant of two justices, be committed to the common gaol, or house of correction, for eighteen months, there to be kept to hard labour.

Upon notice of fire breaking out within the limits aforesaid, all constables and beadles shall immediately repair to the place, with the badges of their authority; and shall assist in extinguishing the fire, causing people to work at the engines, and in preventing goods being stolen; and shall seize all ill-disposed persons they shall find stealing from the inhabitants; also they shall give their utmost assistance to help the inhabitants to remove their goods.)

No action shall be had against any person in whose house, or on whose estate any fire shall accidentally begin, nor any recompence be made by such person for damage suffered thereby: And if any action be brought, the defendant may plead the general issue, and give the act, and the special matter in evidence, at any trial; and if the plaintiff become nonsuited, or discontinue his suit, or a verdict pass against him, the defendant shall recover treble costs; provided that

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no contract between landlord and tenant shall be hereby made void.

Distress made for money recovered by the act, shall not be unlawful, nor the parties making the same be deemed trespassers, on account of any defect of form relating thereto; nor shall the parties be deemed trespassers *ab initio*, on account of any irregularity afterwards done by the party making such distress; but the persons aggrieved may recover full satisfaction for the special damage only, by action on the case, and not by any other.

No plaintiff shall recover in an action for such irregularity, or other proceedings, if tender of amends be made by the party who committed the irregularity or wrongful proceeding before such action be brought; and if no tender be made, the defendant by leave of the court where such action shall depend, at any time before issue joined, may pay into the court such sum as he shall see fit, whereupon such judgment shall be given, as in other actions when the defendant is allowed to pay money into court.

As by the recited act 12 Geo. 3. penalties are inflicted upon persons who should offend against the said act: And as, since the date thereof, buildings have increased within the limits aforesaid, many of which are not built according to the directions of the act, whereby several persons may be under prosecution for the same: And as the owners of such buildings, or workmen employed therein, are willing to make the same as conformable to the directions contained in the act as the nature of each case will admit; it is enacted, That in every action, &c. in any court

of record at *Westminster*, against any such owner or workman, or other persons, for recovery of any penalty incurred, the court where the same may be depending may, on application of the defendants, make a rule for the plaintiff in such action, to deliver to the defendant an account, under the hands of the plaintiff, of the particular defect or irregularity in such building, and to make an order for staying the proceedings until such account shall be delivered; and after the same is delivered, it shall be lawful for such defendant to defend such action, as if this act had not been made, or to enter into a rule of the court for reforming such irregularities and defects, (if any), and for rendering such building as secure against fire, and as conformable to the directions of the act, in such manner, and within such time, as two of the surveyors shall appoint: And such rule being entered into, and payment made to the plaintiff of costs, to be taxed by the proper officer, the court shall order further proceedings to be stayed till the time appointed by the surveyors shall be expired; and after the expiration thereof, such court is required, on application or motion on the behalf of such owner, workman, or other person, and on proof by affidavit to the satisfaction of such court, that the irregularities complained of are reformed, and the building of such house rendered as secure against fire, and as conformable to the directions of the act, in such manner, and within such time, as such supervisors shall have appointed, by such writing as aforesaid, to order proceedings to be peremptorily stayed in such action: And the defendant shall, from thenceforth,

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forth, be indemnified against all penalties incurred by reason of not having originally built such party-walls pursuant to the directions of the act, or by reason of any other defect, whereby such houses are otherwise built than pursuant to such directions.

If no such application shall be made to court before the end of the next term after the expiration of such time as shall be appointed by the surveyors for the purposes aforesaid; or if, upon such application, proof shall not be made by the defendants, to the satisfaction of the court, then the plaintiffs shall be at liberty to proceed in such suit as if the act had not been made.

The court where such rule shall be entered into pursuant to the act, shall proceed against the parties who have entered into such rule, and have refused to perform the same, as for a contempt of court; and shall, on motion, issue the like process of attachment, or otherwise, as is usually issued against suitors for contempt.

The act is not to extend to indemnify persons against whom judgement shall have been given before passing thereof.

All irregular buildings erected since 12 Geo. 3. are to be made secure against fire; and all irregular projections are to be altered, though no prosecutions have been commenced; the situation of such house being certified to the court of mayor and aldermen, by three sworn surveyors; and the said court is to make an order for reforming such irregular projections, or buildings, and securing the same against fire; which order is to be filed in court by the clerk, and the said
irregu-

irregularity is to be reformed within nine months, on pain of 50*l.* penalty for every nine months such defects shall continue.

Informations commenced by virtue of act 12 Geo. 3. are by the authority of this act discharged, acquitted, and indemnified, from and against all such informations; and the said mayor and justices shall discharge them of and from the same accordingly.

No order of the mayor or justice, or other proceeding, is to be removed by *certiorari*.

Appeal may be made to the justices at the quarter sessions, who may examine the same, and award costs; and their order shall be binding and conclusive.

The person intending to appeal shall, immediately after conviction, commitment, distress, or judgement, or within two days afterwards, enter into recognizance to the party appealed against, before a justice of the peace, with sufficient securities, conditioned to try such appeal, and to abide the order of, and pay to the party appealed against, such costs (if any) as shall be awarded against him, by the sessions respectively.

Parishioners may be allowed to be witnesses.

No action shall be brought against persons for penalties inflicted by the act, unless commenced within six calendar months next after such forfeiture shall be incurred.

No action shall be commenced against persons for any thing done in pursuance of this act, until twenty-one days after notice, in writing, of an intention to bring such suit, has been given to the person against whom it shall be brought, nor after

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after the expiration of three calendar months next after the fact committed; and every action, the cause whereof shall arise within *London*, or the liberties, shall be tried in *London*, and not elsewhere; and such action, the cause whereof shall arise in any part of the limits aforesaid out of the said city and liberties, shall be laid and tried in *Middlesex*, and not elsewhere; and the defendant in such action may plead the general issue, and give the act, and the special matter, in evidence, at any trial to be had thereupon, and that the matter for which such action is brought was done in pursuance and by the authority of the act: And if the matter appear to have been done, or if it appear that such action was brought before the expiration of twenty-one days after such notice given as aforesaid, or that sufficient satisfaction was made before such action was brought; or if any action be not commenced within the time limited, or be laid in any other county or place; then the jury shall find for the defendant therein; and if a verdict so be found, or if the plaintiff in any action become nonsuited, or suffer a discontinuance of his suit; or if, in such action, judgement be given for the defendant on demurrer, by default, or otherwise; then the defendant shall have judgement to recover treble costs of suit, and such remedy for recovering the same, as a defendant may have in costs in other cases.

So far as respects party-walls, regulating of buildings, preventing mischiefs by fire, &c. acts 19 *Car. II. c. 3.* 6 *Annæ, c. 31.* 7 *Annæ, c. 17.*

c. 17. 11 Geo. I. c. 28. 33 Geo. II. c. 30.
4 Geo. III. c. 14. 6 Geo. III. c. 27. and an-
other act of the same session as relate to the
regulating of buildings and party-walls, and
preventing mischiefs that may happen by fire,
shall be, and continue, repealed.

The act shall be deemed and taken to be a
publick act; and shall be judicially taken no-
tice of as such by all judges, justices, and other
persons, without specially pleading the same.

CHAP.

CHAP. XII.

Lodgers and Lodgings.

THE laws of *England* do not seem to make any distinction between lodgers and other tenants, as to the payment of their rents, or the turning them out of possession; the landlords of both appear equally intitled to the same remedies, for the recovery of their rents and premises, and the lodgers equally liable to the like penalties, forfeitures, and punishments, in case of non-payment of their rents, or upon not quitting the premises according to notice and agreement, as other tenants are.

The questions and difficulties concerning them, seem to arise solely, from the expence and delay being the same, in recovering rent, obtaining possession, and procuring satisfaction from a two-penny lodger, as from the tenant of 100*l.* a year; and the alledging, that the like objection may be made to every trifling small demand, is nothing to the purpose; because upon perceiving a common debtor abusing your trust and confidence, you may hold your hand, and refuse him any further credit, whereas in the case of a lodger, you are obliged to continue him credit, for if you attempt to right yourself, the remedy is so tedious, so chargeable, and the rent perhaps so very trifling, (though at the same time it may be an object to the party to whom it is due)

that

that the cure, according to the adage, is likely to prove far worse than the disease; the reader will observe, I am here speaking of the lowest class of lodgers; and as there are persons as well as things beneath the law, those we are now mentioning seem to be the former. And the law not affording any relief against these sort of lodgers, both parties must do the best they can, without its interposition; and indeed I am told they do, and that landlords in such desperate cases above alluded to, have resort to as desperate remedies; one of which is to serve a *Witch* ejectment, the process whereof is as follows: to take out the windows and untile the top of the premises, and, if the inclemency of the weather, happens not to be of itself sufficient to answer the purpose, an inundation is introduced by pails, buckets, and water: this is considered as a specific cure, even in the last stage of a lodger's delirium; for it cleanses him of what his landlord *emphatically* calls *all unrighteousness*, meaning the keeping him out of his rent and his premises.

The next class of lodgers that come under consideration are those whom the statute of *W. 3.* hath subjected to felony, in case of their purloining the furniture let to them; and though landlords are thus protected in their goods, so liable to be stolen, yet they are not content, and therefore presume to keep a key of the apartments, in their own custody, unknown to the lodger, and consequently without his consent or privity, and this for the opportunity of seeing, in the absence of the lodger, that no part of the furniture is removed; but I wish to inform such overwise landlords, that the law, upon the discovery

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discovery of this circumstance, would not consider the lodger so far in possession of the furniture, as to be subject to any punishment, in case he had art enough to take the furniture unobserved, because in that case the landlord has as much opportunity as the lodger to purloin the goods, and the law in question was made solely, because the goods were out of the power and protection of the landlord; so, that they by this means, totally defeats his remedy, by that very last he wisely thinks adds a security to his property, unless the lodger happens to be taken in the *mainour*, that is with the furniture in his hands, or about him.

In case lodgers of this class are so refractory, that after warning or notice to quit, they will not, the *Welsh* ejectment may be in part served, for if he happens to reside on the premises, he is at liberty (the lodger's time for possessing the apartments being legally expired) to enter them, whenever he observes an opportunity, that is, finds them open, (for he must use no force, tho' he may all stratagems, to open them) and to take the case-ments out, remove any fixtures or furniture belonging to him (the landlord) take the door off the hinges, or the lock and fastening off the door, and block up the chimney, all this the law authorizes him to do, and he is not a trespasser or even a wrong doer in the eye of the law, as the server of the *Welsh* ejectment above mentioned, is.

I come now to speak of the superior class of lodgers, viz. those who pay 4 guineas or upwards a week; the last mentioned remedy may be applied to them also.

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I have hitherto been speaking of ready furnished lodgings; for if the apartments be let unfurnished by the landlord, and furnished by the lodger, a distress for the rent, in all probability, will recover the possession, as well as the rent; but in case it does not, I think the landlord, once having legal possession, may keep it, and if the landlord will not suffer him to do so quietly, he may then have recourse to the *Writ* of *Ejectment*; but when I advise this remedy, I always presume that the lodger hath either had or given proper notice to quit.

I cannot conclude these observations, without mentioning a circumstance most material to lodgers, which is this:

Suppose *John Doe* lets a piece of ground to *James Clay*, who builds a house thereon, which he lets to *Samuel Smyth*, and he underlets several apartments in it to *Charles Bruce*, who furnishes and lives in them many years, and pays his rent punctually and regularly; now in case there happens to be a long arrear of ground rent due from *James Clay* to *John Doe*; *John Doe* may distrain the goods and furniture of *Charles Bruce*, for such arrears, though he hath paid all his rent; nay more, after *Charles Bruce* hath paid the arrear of ground rent due to *John Doe*, in case *Samuel Smyth* is in arrear of rent to *James Clay*, *James Clay* may also distrain the goods and furniture of the said *Charles Bruce*, and if the said *Charles Bruce* hath taken the said lodging for any time, the said *John Doe* and *James Clay* may both severally distrain the said *Charles Bruce's* furniture, every quarter from time to time as long as the said goods remain on the said premises, during

such

such

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such term of years, the said *Charles Bruce* may have therein; and he seemeth not to be intitled to any relief, either at law or in equity, in case he refuses to pay his rent to his landlord *Samuel Smyth*, unless he shews him *James Clay's* receipt, in order to convince and satisfy him, that his rent is paid; for *Samuel Smyth* may refuse, and immediately seize the goods and furniture of *Charles Bruce*, for his arrears of rent; in which case *Charles Bruce* may have three several distresses brought in upon his goods at one and the same time, that is to say, one by *John Doe*, the ground landlord, a second by *James Clay*, his tenant, and a third by *Samuel Smyth*, *Charles Bruce's* immediate landlord.

So that it seems highly necessary for prudent lodgers, especially those who take unfurnished apartments in order to furnish them, to enquire who the ground landlord is, for the purpose of being satisfied that no arrears of rent are due to him, and he most likely will be able to inform the intended lodger, whether there are any under lessces or not; or in case he should find considerable arrears of rent due, then to procure a consent under the hands of the ground landlord, and of such to whose demands the premises in question stand liable, that they will indemnify him from repaying any rent they may pay to their immediate landlords.

APPENDIX.

APPENDIX of PRECEDENTS.

Form of Agreement for letting an Apartment.

MEMORANDUM made this first day of October, 1777, between John Mitchell, of Goodge-Street, Tottenham Court Road, in the parish of Pancras, and county of Middlesex, carpenter, and Charles Blakemore, of Streatbam-Street, in the parish of St. George Bloomsbury, and said county of Middlesex, dealer in horses, as follows:

The said John Mitchell doth let unto the said Charles Blakemore, the rooms and apartments following, viz. an entire first floor, the fore kitchen and cellar under it, and a fore garret, being part of the house, which he the said John Mitchell now lives in situate and being in Streatbam-Street, aforesaid, TO HAVE AND TO HOLD the said premises for and during the term of half a year, to commence from Midsummer day next, after the date hereof, at and under the yearly rent of ——— pounds of lawful money of Great Britain, payable quarterly by even and equal portions, the first quarterly payment to be made on Michaelmas day next ensuing the date hereof. AND it is further agreed by and between the parties hereto, that the said Charles Blakemore, after the expiration of the said half year, may hold and enjoy

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enjoy the said premises from quarter to quarter, so long as both parties shall agree at the rent of ——— pounds every quarter, and each party is at liberty to give a quarter's warning for the quitting possession of the said premises. AND it is also further agreed between the said parties, that when the said Charles Blakemore shall leave the said premises he shall leave the glass windows and other things belonging to the said premises in as good condition as they now are (reasonable wear only excepted) *As witness, &c.*

Witness,

N. B. This writing requires no stamp.

For letting of a House.

MEMORANDUM made the ——— day of ———, 1773, between A. B. of, &c. and C. D. of, &c. as follows, viz.

THE said A. B. doth demise and let unto the said C. D. a house and garden with the appurtenances, situate in ———, in the county of ———, late in the possession of E. F. and now of ———, for the term of *three years* certain, and a quarter's warning or notice to be given or left in writing by either of the said parties, to or for the other of them, at the end of the said *three years*. The rent thereof to commence from *Lady-day* next, at and under the yearly rent of ——— payable quarterly; the first payment thereof to begin and be made at *Midsummer-day* next.

THE said C. D. doth agree to take the said house of the said A. B. for the term and at the
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rent payable in manner aforefaid; AND ALSO that he will at his own coſts and charges make good, or cauſe to be made good, and put into the ſame or as good condition and order as the ſame lately was in, the kitchen, or ground-room of or belonging to the ſaid houſe, which he has now converted or cauſed to be converted into a cheeſe-monger's ſhop, at the expiration or other ſooner determination of this preſent demife; *And alſo* will then leave on the ſaid premiſes, for the uſe of the landlord, the paper hangings in the chambers, the back window-shutters, the ſtone-hearth, two ſhelves in the cloſet, one ſhelf in the kitchen, and another ſhelf in the waſh-houſe of and belonging to the ſaid houſe, *As witneſs, &c.*

Witness,

N. B. This writing requires no ſtamp.

For letting a Houſe, with a Covenant for a Leaſe at the Option of the Leſſee.

MEMORANDUM made the ——— day of ———, 1774, between A. B. of, &c. and C. D. of, &c. as follows, viz.

THE ſaid A. B. in conſideration of the rent herein after mentioned and agreed to be paid to him, *both* demife, and hereby *doth* demife, and let unto the ſaid C. D. a meſſuage or tenement, ſituate and being in ——— court, in the pariſh of ———, TO HOLD to the ſaid C. D. for the term of *one year*, to commence from *Chriſtmas-day* next, at the yearly rent of ——— pounds, to be paid quarterly; *And* the ſaid A. B. hereby agrees by or before *Chriſtmas-day*

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day next, well and sufficiently to repair, amend, and put in good and tenantable order and condition, the said house with its appurtenances, in all needful and necessary reparations and amendments whatsoever; in case the same is not already in such good and sufficient repair and condition, and the same premises so to continue and keep in such repair from thence forth, for and during all such time as the said *C. D.* shall be, and continues therein as tenant at will only.

The said *C. D.* in consideration thereof hereby agrees to take and rent the said house of the said *A. B.* for the term, and at the rent, payable as aforesaid, which said rent she agrees accordingly to pay unto him quarterly.

AND it is hereby mutually agreed between the said parties, that after the expiration of the said term of a year, if either of them shall be minded or desirous to quit, leave, or part with each other, or from the said premises, she or he shall give one quarter's warning or notice in writing thereof to the other of them.

AND if, after the said term of a year be expired, she the said *C. D.* shall be minded or desirous to have and take a lease of the said premises with the common and usual covenants, for a further term of *three* or *seven* years, at ——— pounds a year, payable quarterly, and of such her intention and desire shall give notice in writing to the said *A. B.* within *three months* after the expiration of the said term of a year, that then he the said *A. B.* shall and will grant her such lease for such further term or terms, and at such rent, and payable as aforesaid, the costs and charges of such lease to be paid and discharged

equally, by and between the said parties, *As witness, &c.*

Witness,

N. B. This writing requires no stamp.

For granting a Lease of a House.

MEMORANDUM made this ——— day of ———, 1774, between *A. B.* of, &c. of the one part and *C. D.* of the other part as follows, viz.

FIRST that the said *A. B.* doth hereby agree at his own costs, with all convenient speed to execute unto the said *C. D.* a lease of ALL that messuage late in the possession of *E. D.* situate in ———, with the appurtenances, To hold to him the said *C. D.* his executors and assigns, from *Midsummer-day* now next ensuing, for the term of ——— years, at and under the annual rent of ——— pounds, payable quarterly, free of taxes, (*except the land-tax*); which lease shall contain all the usual and reasonable covenants, and particularly covenants that the said *A. B.* shall allow out of the *first year's rent* of the said premises the sum of ——— pounds, towards the repairs thereof, and that he shall also pay all the taxes in respect of the said house to *Midsummer-day* next; and shall also indemnify the said *C. D.* and his assigns from the ground rent thereof, during the said term; and there shall be also inserted in the said lease, an-exception against damages happening by fire, to the said premises, during the said term, in consideration whereof the said *C. D.* doth hereby agree

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agree to accept such lease, and to execute a counter-part thereof, *As witness, &c.*

Witness,

N. B. This writing requires no *stamp*.

For a Lease of Garden Ground.

MEMORANDUM made this — day of —, 1774, between *H. B.* of, *&c.* and *C. D.* of, *&c.* as follows, *viz.*

THE said *H. B.* in consideration of the rent and agreements herein after mentioned, *doth* agree to demise, and let by a good and sufficient lease in the law thereof, unto the said *C. D.* ALL that field with the appurtenances thereunto belonging, situate near or adjoining to, *&c.* late in the occupation of *E. F.* a gardener, together with all ways, paths, passages, waters, water-courses, easements, privileges and appurtenances whatsoever, to the same belonging or appertaining, or therewith held, used, occupied, possessed, enjoyed, or accepted, reputed, taken or known to be part, parcel, or member thereof, or of any part thereof; *To hold* the same for the term of — years from *Christmas-day* last past, at and under the yearly rent of — pounds, payable quarterly, the first payment thereof to be made at *Lady-day* next ensuing the date thereof. AND the said *C. D.* is to have full and free liberty to lop and top the trees and hedges of the said premises, at seasonable and convenient times, and to plow up and erect upon the same any shed or sheds, or other convenient buildings during the said term, he from time to time scouring and

cleanſing the ditches, and repairing and making good the fences, hedges, and gates thereof.

AND the ſaid *C. D.* in conſideration thereof, *doth* agree to take the aforeſaid premiſes for the term, and at the rent, payable in manner aforeſaid, and to execute a counter-part of the aforeſaid leaſe; *And alſo* to ſcour and cleanſe the ditches, and repair, make good, and keep up the fences, hedges, and gates of the ſaid premiſes, *As witneſs, &c.*

Witness,

N. B. This writing requires no ſtamp.

For the Purchase of a Houſe and Premiſes.

MEMORANDUM made this — day of —, 1774, between *H. B.* of, &c. and *G. D.* of, &c. as follows, *viz.*

THE ſaid *H. B.* *doth* hereby agree by good and ſufficient conveyances in the law, at or before *Chriſtmas-day* next, to aſſign, ſell, and convey unto the ſaid *C. D.* his heirs and aſſigns, free from all incumbrances whatſoever and howſoever; ALL thoſe three houſes, yards and appurtenances, together with all and every the grates, locks and fixtures, therein and thereon, ſituate in —, in the pariſh of —, *London*; *And alſo* a piece of ground near thereto adjoining, in the poſſeſſion of *E. F.* Eſq; *To hold* unto her the ſaid *C. D.* her heirs and aſſigns for ever, at and for the price or ſum of — pounds, to be paid unto him by her, on a ſufficient title being made and executed unto her by him; *And alſo* to aſſign over unto her the ſeveral policies of inſurance of the

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the said houses, and to clear, pay, and discharge all taxes, charges, incumbrances, and impositions, charged or assessed on the said premises, unto *Christmas-day* aforesaid, and to indemnify her, or reimburse her on account thereof.

AND the said *C. D.* on her having, by the conveyances aforesaid, the said premises assigned and conveyed unto her, at or by the time aforesaid, in manner aforesaid, *doth* hereby agree to pay unto the said *H. B.* the price or sum aforesaid, for the same, and hath now paid unto the said *H. B.* the sum of ——— pounds, in part of the purchase money aforesaid, *As witness, &c.*

Witness.

N.B. Let there be a receipt for the money paid. This writing requires no stamp.

For building a House.

MEMORANDUM made this ——— day of ———, 1774, between *H. B.* of, &c. of the one part, and *C. D.* of the other part as follows:

THE said *C. D.* for the considerations herein after mentioned, *doth* agree with the said *H. B.* that he the said *C. D.* or his assigns, will, within the space of three *calendar months* next following the day of the date of these presents, find and provide all fit and proper materials and things, and erect, build, and finish, in a good, sound, substantial, and workman-like manner, one brick house or building, on a piece or parcel of waste ground situate, &c. according to a plan thereof, hereunto annexed, and of the dimen-

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sions following, *viz.* (here insert the dimensions of the building, and scantlings of the timber intended to be used in the building thereof) AND the said H. B. for the considerations aforesaid, doth agree with the said C. D. to well and truly pay, or cause to be paid, unto the said C. D. the sum of ——— pounds, of lawful money of Great Britain, in manner following, that is to say ——— pounds part thereof as soon as the foundation of the said house is laid, ——— pounds other part thereof when the brick-work of the said house shall be carried up and tiled in, and the remaining ——— pounds, being in full for building the said house, when the same shall be compleated, inside and out, fit for decupation, *subject* to the approbation of E. F. surveyor to the said H. B. AND LASTLY, the said H. B. and C. D. do further agree by these presents, to execute to each other, with all convenient speed, an article of agreement in the penalty of ——— pounds, for the true performance of all and every the matters and things aforesaid, *As witnesses, &c.*

Witness. *the said H. B. and C. D. have signed and*

N. B. This writing requires no stamp.

For letting a ready-furnished Lodging.

MEMORANDUM it is agreed between H. B. of the parish of ———, in the county of ———, Grocer, and C. D. of, &c. Gent. as follows:
FIRST the said H. B. agrees to let unto the said C. D. a room up two pair of stairs for-
wards in his house, in ——— street, in the parish
aforesaid, ready furnished; together with the use
of

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of his maid-servant, in common with other lodgers, and when he himself can spare her, with the use of a cellar for coals and beer, at and after the rate of ——— pounds a year, payable quarterly, and either party who quits or leaves the said premises, to give or take a quarter's warning.

The said *C. D.* agrees to take the said room of the said *H. B.* at the rate or price, and payable as aforesaid, to find or provide himself with all manner of linen, and china-ware, whatsoever, he shall have occasion to make use of therein. And that if he shall damage or break any part of the furniture of the said *H. B.* that he will amend, make good, or pay her for the repairing of the same again. *As witness, &c.*

Witness.

N. B. The foregoing agreements if not complied with, by either party, must be established in a court of equity. This writing requires no stamp.

A Lease of a House for seven Years, with the usual Covenants.

THIS indenture made the ——— day of ———, in the ——— year of the reign of our Sovereign Lord *George* the Third, by the Grace of God of *Great Britain, France and Ireland*, King, Defender of the Faith, and so forth, and in the year of our Lord ———, BETWEEN *J. S.* of, &c. of the one part, and *G. T.* of, &c. of the other part; WITNESSETH, That for and in consideration of the yearly rent, covenants, and agreements herein after contained on the part and behalf of the said *G. T.* his executors, administrators and assigns, to be paid, done, and performed. *He* the said *J. S.* hath demised, set, and to farm letten, and by these presents doth demise,

demise, set, and to farm let unto the said G. T. **ALL** (*The premises demised with a particular description thereof*) situate, standing and being in ———, in the parish of ———, and adjoining on the south part thereof, to the premises lately in the tenure or occupation of H. T. *together*, with all cellars, solars, chambers, rooms, yards, gardens, lights, easements, ways, passages, waters, water-courses, profits, commodities, and appurtenances whatsoever, to the said messuage or tenement, and premises belonging or in anywise appertaining. **TO HAVE AND TO HOLD** the said messuage or tenement, and premises, herein before mentioned, or intended to be hereby demised, with their and every of their appurtenances unto the said G. T. his executors, administrators and assigns, from the Feast day of *the Nativity of St. John the Baptist*, now next ensuing the date of these presents, for and during, and unto the full end and term of *seven years* from thence next ensuing, and fully to be compleat and ended. **YIELDING AND PAYING** therefore yearly, and every year during the said term of *seven years*, unto the said J. S. his executors, administrators, and assigns, the yearly rent or sum of ——— pounds, of lawful money of *Great Britain*, at the four most usual feast days, or times of payment of rent in the year; (that is to say) *the Feast Day of St. Michael the Archangel, the Birth of our Lord Christ, the Annunciation of the blessed Virgin Mary, and the Nativity of St. John the Baptist*; by even and equal portions, the first payment thereof to be made on the *Feast Day of St. Michael the Archangel* now next ensuing. **AND** the said G. T. for himself, his executors, administrators

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administrators and assigns, doth covenant, promise and agree, to and with the said J. S. his executors, administrators and assigns, by these presents in the manner and form following; (that is to say) That he the said G. T. his executors, administrators and assigns, or some or one of them, shall and will yearly and every year during the said term of *seven years*, hereby demised, well and truly pay, or cause to be paid unto the said J. S. his executors, administrators or assigns, the said yearly rent or sum of — pounds, hereby reserved in the manner and proportions, and on the days and times above limited and appointed for payment thereof, according to the true intent and meaning of these presents. **AND ALSO** shall and will, at his, their, or some or one of their own proper costs and charges from time to time, and at all times hereafter during the said term hereby granted, when, where, and as often as need or occasion shall be, or require, well and sufficiently repair, support, uphold, sustain, maintain, pave, purge, empty, cleanse, scour, glaze, amend, and keep the said messuage or tenement, and premises hereby demised, and every part thereof with the appurtenances thereunto belonging, or to belong, in, by, and with all manner of needful and necessary preparations, supportations, glazings, pavings, purgings, scourings, cleansings, emptyings and amendments whatsoever; and the said messuage or tenement with the appurtenances hereby demised, so well and sufficiently upheld, sustained, maintained, repaired, paved, purged, emptied, cleansed, scowered, glazed, amended, and kept at the end, or other sooner determination of this lease,

which shall first happen, shall and will peaceably and quietly leave, surrender, and yield up, unto the said J. S. his executors, administrators or assigns, together with all such things as are mentioned, or set forth in the schedule or inventory thereof hereunder written, in as good plight and condition as the same now are, (reasonable use and wearing thereof and all inevitable accidents by fire, which may happen to burn down and consume the said premises or any part thereof, in the mean time only excepted.) AND FURTHER, that it shall and may be lawful to and for the said J. S. his executors, administrators and assigns, with workmen or without, twice or oftner in every year during the time hereby granted, at all convenient times in the day time to enter and come into and upon the demised premises, and every or any part thereof, there to view, search, and see, whether the same be well and sufficiently supported, upheld, sustained, maintained, repaired, purged, emptied, cleaned, scowered, glazed and amended, as the same ought to be according to the true intent and meaning of these presents, and of all the defects, defaults, decays, lacks, and wants of reparations and amendments, which upon every or any such view or views shall be found, to give or leave notice or warning in writing at the said demised premises, or some part thereof unto or for the said G. T. his executors, administrators, or assigns, within the time or space of *three months* then next following; within which said time or space of *three months* after every such notice or warning shall be given or left as aforesaid, the said G. T. for himself, his executors, administrators, and assigns,

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assigns, ~~doth~~ covenant, promise and agree, to and with the said Y. S. his executors, administrators and assigns, by these presents, from time to time during this demise, well and sufficiently to repair and amend the same accordingly. **PRO-**
VIDED ~~always~~, that if it shall happen that the said yearly rent of ——— pounds, or any part thereof, shall be behind or unpaid for the space of 28 days, next over or after any of the said feast days, or times of payment, on which the same ought to be paid as aforesaid, being lawfully demanded; or if the said G. T. his executors, administrators or assigns, and each and every of them, do not in and by all things well and truly observe, perform, fulfil, and keep, all and singular the covenants, grants, articles, and agreements in these presents contained, which on his and their parts and behalfs are or ought to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents, that then and from henceforth in any such case, and at all times then after, it shall and may be lawful to and for the said Y. S. his executors, administrators or assigns, into the said messuage or tenement, and premises, hereby demised, or into any part thereof in the name of the whole, wholly to re-enter, and the same to have again, repossess and enjoy, as in his and their first and former estate, and the said G. T. his executors, administrators and assigns, and all other the occupiers of the premises, thereout and from thenceforth utterly to expel, put out, and move, this indenture, or any thing herein contained to the contrary thereof, in any wise notwithstanding.

notwithstanding. AND LASTLY, the said *J. S.* for himself, his executors, administrators and assigns, doth covenant, promise and agree, to and with the said *G. T.* his executors, administrators, and assigns, by these presents, that he the said *G. T.* his executors, administrators and assigns, paying the said yearly rent herein before reserved at the place, and on the several feast days and times, before limited and appointed for payment thereof, and observing, performing, paying, fulfilling and keeping, all and singular the payments, covenants, grants, articles, provisos, conditions and agreements, in these presents contained, which, on his and their parts and behalfs, are or ought to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents, shall and lawfully may, peaceably and quietly, have, hold, occupy, possess and enjoy the said demised premises, with their and every of their appurtenances during the said term of — years hereby granted, without the lawful let, suit, trouble, molestation, denial, or eviction, of or by the said *J. S.* his executors, administrators or assigns, or any of them, or of or by any other person, or persons whatsoever, lawfully having, or claiming to have, any right, title, or interest, in or to the said demised premises, with the appurtenances, or in or to any part or parcel thereof, by, from, or under the said *J. S.* his executors, administrators or assigns, or any of them, or by or through their or any of their means, consent, or procurement, *In witness*

When

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When it is a running Term, this proviso must be added before the words, In witness.

And lastly, it is hereby declared and agreed by and between the said parties hereto, and these presents are upon this express condition nevertheless, that in case the said G. T. his executors, administrators or assigns, shall be minded or desirous to quit or leave the said hereby demised premises, at the end or expiration of the first — years of the said term of — years hereby demised, and shall and do give notice in writing under his, their, or any of their hands, of such his, their, or any of their intention and desire, to or for the said J. S. his executors, administrators or assigns, at his or their dwelling-house, or last place of abode, *six calendar months* before the end and expiration of the first — years of the said term of — years hereby demised, that then, and in such case, it shall and may be lawful to and for the said G. T. his executors, administrators and assigns, and every of them, to quit and leave the said hereby demised premises, at the end of the said first — years of the said term hereby demised, according to such notice so to be given or left as aforesaid; he or they first paying all rent then due and in arrear, and leaving the premises in repair, pursuant to the covenants aforesaid. AND in case the said J. S. his executors, administrators and assigns, shall likewise be minded and desirous to take the said premises into his or their own hands, at the expiration of the said first — years, and of such his, their, or any of their intention or desire, shall give or leave notice in writing at the said

said premises, to or for the said G. T. his executors, administrators or assigns, *six months* before the expiration of the said first — years, that then and in such case the said J. S. his executors, administrators or assigns, shall be at liberty to enter upon and take possession of the said premises, at the expiration of the said first — years of the term hereby demised, according to such notice so to be given or left as aforesaid, any thing herein before contained, &c.

N. B. This writing requires a five shilling stamp.

A Lease of a Farm, with the usual Covenants.

THIS INDENTURE made the — day of —, in the — year of the reign of our Sovereign Lord George the Third, by the Grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, &c. and in the year of our Lord —, BETWEEN T. C. of, &c. Esq; and M. his wife (which said M. is the only daughter and heir at law of J. K. Esq; her late father deceased) of the one part, and T. M. of, &c. yeoman, of the other part, WITNESSETH, That for and in consideration of the rents, covenants, and agreements, herein and hereby mentioned and reserved, on the part and behalf of the said T. M. his executors, administrators and assigns, to be observed, paid, done and performed. They the said T. C. and M. his wife have demised, leased and to farm letten, and by these presents do demise, lease and to farm let unto the said T. M. his executors, administrators

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administrators and assigns, ALL that messuage, tenement, or farm-house commonly called or known by the name of —, with all houses, edifices, buildings, barns, stables, orchards, yards, gardens, back-sides, closes, lands, meadows, pastures, wood-grounds, ways, passages, commodities and appurtenances whatsoever, thereunto belonging or appertaining, containing by estimation — acres more or less, situate, lying and being in the several parishes of —, and in the said county of —, and which now, and for some time last past, have been in the tenure or occupation of the said T. M. *except*, and always reserved out of this present demise unto the said T. C. and M. his wife, and the heirs and assigns of the said M. ALL, and all manner of timber, and timber-like trees, bodies of pollards, and other trees, young storeyers of oak, ash, aspe, elm and beech likely to make timber or pollards, and all wariors now standing, growing or being, or which during the term hereby demised shall be standing, growing or being, in, upon, or about the above demised premises, or any part thereof, *with* free liberty of ingress, egress and regress, to and for the said T. C. and M. his wife, and the heirs and assigns of the said M. with servants, horses, carts and carriages, to sell, cut down, cart, and carry away the same at such times as the underwood shall be sold, where such timber shall stand, and not doing any wilful hurt, spoil, or damage to the corn, grain or grass, of the said T. M. his executors, administrators or assigns, then growing upon the premises aforesaid. **TO HAVE AND TO HOLD** the said messuage and premises above-mentioned,

mentioned to be demised with the appurtenances (except as before excepted) unto the said *T. M.* his executors, administrators and assigns, from the *feast day of St. Michael the Archangel* next, proceeding the date of these presents, for and during and unto the full end and term of — years from thence next ensuing, and fully to be compleat and ended; **YIELDING AND PAYING** therefore yearly and every year during the said term, unto the said *T. C.* and *M.* his wife, and the heirs and assigns of the said *M.* the yearly rent or sum of — pounds, of lawful money of Great Britain, at the two most usual feasts or days of payment of rent in the year; (that is to say) *the Feast of the Annunciation of the Blessed Virgin Mary, and St. Michael the Archangel,* by even and equal portions. **AS ALSO YIELDING AND PAYING** unto the said *T. C.* and *M.* his wife, and the heirs and assigns of the said *M.* for every acre of the demised premises, that are and have been used for meadow, pasture, and hedge greens; And also all that little pightle, in —, which he the said *T. M.* his executors, administrators or assigns, or any of them, shall plough, break up, or convert into tillage, the yearly rent of —, at or upon the feast days and times above-mentioned, and so after that rate for every greater or lesser quantity thereof than an acre over and above the yearly rent hereby before reserved, **AND** the said *T. M.* for himself, his heirs, executors, administrators, and for every of them, doth covenant, promise and agree to and with the said *T. C.* and *M.* his wife, and the heirs and assigns

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assigns of the said *M.* in manner following;
(that is to say) That he the said *T. M.* his executors, administrators or assigns, or some or one of them, shall and will well and truly pay, or cause to be paid unto the said *T. C.* and *M.* his wife, and the heirs and assigns of the said *M.* the yearly rent hereby before reserved at the days and times, and by the proportions, above-mentioned and appointed for payment thereof, according to the true intent and meaning of these presents; AND that he the said *T. M.* his executors, administrators and assigns, and every of them, shall and will, at their own proper costs and charges during the said term hereby demised, repair, uphold, pale, support, amend, maintain and keep the messuage, barns, stables and out-houses, edifices and buildings above demised; And also hedge, ditch, scour, cleanse, and in good repair keep, all and singular the hedges, ditches, gates, stiles, fences and quicksets; and preserve all young storeyers of oak, ash, aspe, beech and elm likely to make timber, and preserve the fruit trees growing in the orchards, and other the demised premises from the hurt and spoil of cattle, or any other wilful or negligent spoil, and if any of the said trees die, plant new ones in the room and instead thereof. And the said messuage, barns, stables, edifices and buildings so as aforesaid repaired, upheld, paled, raised, supported, amended, maintained and kept, and the hedges, ditches, gates, stiles, storeyers, fruit trees and fences so hedged, ditched, fenced, scoured, cleansed, and the quicksets preserved in and good repair kept, shall and will, at the end

end and expiration or other sooner determination of this present lease, peaceably and quietly leave, surrender and yield up the same, and all and every of them, unto the said *T. C.* and *M.* his wife, and the heirs and assigns of the said *M.* AND that the said *T. M.* his executors, administrators and assigns, and every of them, shall lay all the corn and hay growing in and upon the said premises into the barns, and spend the same upon the premises; and shall not employ, sell, or carry away, or suffer to be sold or carried off or from the said demised premises to be elsewhere employed, any straw, stover, soil or dung whatsoever, which shall arise or be made thereon, nor spend nor waste the straw and stover upon any pretence whatsoever, otherwise than to make dung thereof, and all the mud and dung which they shall make in the highways thereto adjoining, shall lay or leave the same to or upon the said premises, there to be spent and not elsewhere (*except* all such hay as shall be growing upon the premises in the last year of the term hereby demised, which it shall and may be lawful to and for the said *T. M.* his executors, administrators and assigns, if they leave the said premises, to carry off and spend it elsewhere). AND FURTHER that he the said *T. M.* his executors, administrators and assigns, shall not nor will, at any time during the said term, cross, crop, or double crop any part of the said premises, but according to the course of husbandry in the country where the premises do lie, but shall keep the usual and ordinary seasons for tilling thereof (that is to say) The *first* year *wheat, rye, or barley*, the *second* year *Lent corn*; and shall not sow any barley in
any

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any one year of the said term, unless it be upon a summer's fallow: AND shall and will, during the term hereby demised, permit and suffer *thirty acres* more of the arable land hereby demised to lie in pasture; and that he the said *T. M.* his executors, administrators or assigns, shall leave *fifty acres* of the said demised premises for fallow in the last year of the term hereby demised, which it shall and may be lawful to and for the said *T. G.* and *M.* his wife, and the heirs and assigns of the said *M.* to enter on at the *Fest of the Annunciation of the Blessed Virgin Mary* next, before the end of the said term hereby demised, to stir, dress and manure the same; and to take all such dung as shall be left in or about the yards, to lay on such fallow, and to take and have stable room for horses, and lodging room for servants for doing thereof. AND that he the said *T. M.* his executors, administrators, or assigns, shall not nor will cut, lop, or top, or make any hedges, but when the fields whereto they belong, are sowed with *winter corn*, and that at seasonable times in the year, and shall not nor will make up any of the hedges, fell or cut the underwood, nor lop nor top the pollards of or belonging to the said premises, or any part thereof under — years growth. AND the said *T. G.* for himself, and for the said *M.* his wife, and her heirs, executors, and administrators, *doth* by these presents covenant, promise, and agree, to and with the said *T. M.* his executors, administrators, and assigns, in manner following (that is to say) that for as much as the premises aforesaid are copyhold, and cannot be leased for any longer term than for — years; that at the end of this demise

mise he the said *T. C.* and *M.* his wife, or one of them (the covenants of the said lease being performed by the lessee, his executors and administrators) shall and will, at the request, half cost and charges, of the said *T. M.* his executors or administrators, make, grant, seal, and execute the like lease, with this present lease for ——— years longer; and at the end of ——— years upon the request as aforesaid, the like lease for ——— years longer and so from ——— years to ——— years, for and during the term of ——— years: AND the said *T. C.* for himself, and for the said *M.* his wife, and her heirs, executors, administrators and assigns, and for every of them, doth by these presents further covenant, promise and agree to and with the said *T. M.* his executors, administrators or assigns, that they the said *T. C.* and *M.* his wife, and the heirs and assigns of the said *M.* shall and will from time to time, and at all times during this present demise, on reasonable request to him, her or them, made by the said *T. M.* his executors, administrators, or assigns, or any of them, and at seasonable times in the year, assign, appoint, and allow unto the said *T. M.* his executors, administrators, or assigns, brick and tile at the nearest kiln to the said messuage, and sufficient rough timber on the premises hereby demised or elsewhere, within two miles of the said messuage, for all manner of reparations of the said premises hereby demised. AND that the said *T. M.* his executors, administrators, and assigns, shall and may have and enjoy the use of the yards and barns belonging to the said premises, stable room for his horses, and house room for

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himself and servants, for the thrashing and spending of the last years crop, growing and arising upon the premises hereby demised, until the — day of — next, after the end of this demise; and that it shall and may be lawful to and for the said *T. M.* his executors, administrators and assigns, for and under the several rents hereby reserved, and the covenants which on his and their parts are and ought to be paid, performed, and kept, peaceably and quietly to have, hold and enjoy the said messuage and premises aforesaid, (*except as before excepted*) during the term hereby demised, without the lawful let, suit, trouble, or interruption of the said *T. C.* and *M.* his wife, their heirs, or assigns, or any of them. **PROVIDED ALWAYS**, on this consideration *nevertheless*, that if it shall happen the said yearly rent of — pounds, or any part thereof shall be behind or unpaid by the space of — days next, over or after either of the said feasts or days of payment aforesaid, in the several years aforesaid, in which the said several sums ought to be paid as aforesaid. Or if the said *T. M.* his executors, administrators, or assigns, or any of them, do and shall assign, or make over this present indenture of lease or the premises hereby demised, or any part thereof, for any term or time whatsoever, without the licence and consent of the said *T. C.* and *M.* his wife, or her heirs or assigns, first had and obtained in writing under his and their hands and seals for that purpose; that then, and from thenceforth it shall and may be lawful to and for the said *T. C.* and *M.* his wife, and the heirs, and assigns, of the said *M.* into the said demised premises, or any part thereof in the

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name of the whole wholly to re-enter, and the same to have again; retain; repossess; and enjoy as in his, her, and their first and former estate and estates; and the said T. M. his executors, administrators, and assigns, and all other occupiers thereof, from thenceforth utterly to expel, and put out, any thing herein contained to the contrary thereof, in any wise notwithstanding. *In witness, &c.*

Scaled and delivered, &c.

N. B. *This writing requires a 5s. stamp.*

An Indemnity given to a Person on assigning a Lease to another.

TO ALL TO WHOM these presents shall come, H. T. of, &c. esq; *sends greeting,*
WHEREAS by indenture of lease dated the — day of — last, and made between E. G. of, &c. widow, of the one part, and T. C. of, &c. victualler, of the other part, for the considerations therein mentioned, the said E. G. DID demise, lease, grant, and to farm let unto the said T. C. ALL those two messuages or tenements (formerly three messuages or tenements) yards and passage thereunto belonging, with their and every of their appurtenances, situate, lying and being in —, in the said parish of —, as therein mentioned, and then and now in the possession of the said T. C. **TO HOLD** to the said T. C. his executors, administrators and assigns, from the feast day of the *Annunciation of the Blessed Virgin Mary* then last past,

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past, for and during and unto the full end and term of _____ years, from thence next ensuing, and fully to be compleat and ended, together with all such goods and things as were mentioned and expressed in the schedule thereunder written, AT and under the rent of a pepper corn, payable on the feast day of the *Annunciation of the Blessed Virgin Mary* last past, for the first year of the said term thereby demised, and the yearly rent of _____ pounds, during the residue and remainder of the said term thereby demised, payable quarterly, by even and equal portions, the first payment thereof to begin and be made on the feast day of *St. John the Baptist* now next ensuing. In which said lease (amongst other covenants) was contained a covenant, that the said T. C. his executors, administrators, and assigns, should before the feast of the *Annunciation of the Blessed Virgin Mary* last past, well and truly pay, lay out, and expend the sum of _____ pounds, of lawful money of *Great Britain*, in and upon necessary and substantial repairs of the messuages or tenements, and premises thereby demised. AND WHEREAS the said T. C. has since the date of the said lease, in pursuance and part performance of the said covenants, accordingly paid, laid out, and expended the sum of _____ pounds, of lawful money of *Great Britain*, in and upon necessary and substantial repairs of the said messuages or tenements, and premises, as appears by the several workmens bills, and receipts, thereon given. **N Y D** WHEREAS E. G. has agreed to take the said messuages, or tenements, and premises, on the said feast day of *St. John the Baptist* now next

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ensuing, and the said T. C. has delivered unto the said H. G. the said several workmens bills and receipts thereof; And also paid or deposited in his hands the sum of — pounds in pur-
 suance and in full thereof, and also paid or de-
 posited in his hands the further sum of — pounds,
 for the said quarterly payment of the rent due
 for the said premises, on the performance of the
 said covenant for the repairs of the said premises,
 from the day of the date hereof, and likewise in
 pursuance of the said agreement has, on the day
 of the date hereof, bargained, sold, and assigned
 over the said lease of the said premises thereby de-
 manded unto the said H. G. for the rent, residue,
 and remainder yet to come and unexpired, of the
 said term of — years, at in and by the said
 lease and assignment thereof, relation being
 thereunto had, may more fully and at large ap-
 pear. NOW KNOW YE, that I the said
 H. G. as well for the considerations aforesaid, as
 also in consideration of the sum of — pounds,
 of lawful money of Great Britain, to me in hand
 paid by the said T. C. at or before the sealing
 and delivery thereof, (the receipt whereof is
 hereby acknowledged) do hereby, for myself, my
 heirs, executors, and administrators, covenant,
 promise, and agree, to and with the said T. C.
 his executors, and administrators, that I the said
 H. G. being executor, and administrator, shall
 and will, from time to time and at all times here-
 after, save, defend, and keep harmless, and re-
 dempt him the said T. C. his heirs, executors, ad-
 ministrators, and his and their lands, and re-
 ments, goods, and chattels, of, from, and against,

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all and every the covenants, clauses, provisions, conditions, and agreements whatsoever, mentioned, expressed, reserved, and contained in the said lease, on the tenants or lessee parts and behalfs thereof, to be paid, kept, done, and performed; And also of and from all and all manner of action and actions, suit and suits whatsoever, brought or to be brought, commenced, or prosecuted, against the said T. G. his executors, or administrators, for, on account, or concerning the said lease, or the said premises thereby demised, or otherwise howsoever relating to the same. **IN WITNESS** whereof I the said

H. H. have hereunto set my hand and seal the day of the year of our Lord

sealed and delivered (being first duly stamped) in the presence of us,

N. B. This writing requires a 5s. stamp

An Absolute Assignment of a Lease, together with the Policies of Insurance insuring the same

HOLD the same premises unto the said

THIS INDENTURE made the day of —, in the year of the reign of our Sovereign Lord George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, and in the year of our Lord —, **BETWEEN** C. H. of the parish of —, in the city of —, widow, and administratrix of B. H. of —

AND WHEREAS the said

the same parish and city, carpenter, her late husband deceased, of the one part, and C. D. of _____ in the county of _____, of the other part. WHEREAS by indenture of lease bearing date the _____ day of _____, which was in the year of our Lord _____, and made between S. D. of _____ in the county aforesaid, of the one part, E. H. of _____ in the parish of _____, citizen and carpenter, of the other part; he the said S. D. for the considerations therein mentioned, did demise, and to farm let unto the said E. H. ALL those two messuage or tenements and premises, situate, lying and being on the south side of _____ in the county of _____, and each of the said houses are abutting on a passage leading from _____, part of the said houses being built against the said passage, and then late in the several tenures or occupations of I. & and B. G. widow, as the said premises are particularly described in the map or ground-plot thereunto annexed, together with all vaults, lights, easements, ways, passages, waters, water-courses, and appurtenances, which of right belong to the said premises, and except any door-ways, or water-courses going into _____. TO HOLD the same premises unto the said E. H. his executors, administrators, and assigns, from the feast day of the Birth of our Lord Christ then last past, for and during and unto the full end and term of _____ years from thence next ensuing, and fully to be compleat and ended, at and under the yearly rent of _____ pounds, of lawful money of Great Britain, payable quarterly, free from all taxes, duties, rates, and assessments whatsoever. AND WHEREAS the said E. H. lately

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lately departed this life intestate, and letters of administration of the goods, and chattels, rights and credits, of the said *E. H.* were granted unto the said *C. H.* party hereto, reference to the recited indenture of lease, and letters of administration being had, will more fully appear. AND WHEREAS the said *C. D.* hath contracted and agreed, to and with the said *C. H.* for the purchase of the said herein before-mentioned premises, for the remainder of the said term of ——— years, which is now to come therein and unexpired, at or for the price or sum of ——— pounds. NOW THIS INDENTURE WITNESSETH, that for and in consideration of the said sum of ——— pounds of lawful money of Great Britain, to the said *C. H.* in hand well and truly paid by the said *E. H.* at or before the sealing and delivery of these presents, the receipt whereof the said *C. H.* doth hereby acknowledge, and thereof and of and from every part thereof doth acquit, release, and discharge the said *C. D.* his heirs, executors, and administrators, for ever by these presents: the said *C. H.* hath granted, bargained, sold, assigned, and set over, and by these presents doth fully and absolutely grant, bargain, sell, assign, and set over, unto the said *C. D.* ALL those two messuages or tenements, then late in the several tenures or occupations of *I. S.* and *B. G.* widow: And also all that brick messuage or tenement lying behind one of the said messuages or tenements now or late in the tenure or occupation of *I. S.* which said last mentioned messuage or tenement was erected and built by the said *E. H.* on the said premises, since the commencement of the herein before re-

cised indenture of demise; and all and singular
 other the premises with their and every of their
 appurtenances therunto belonging or appertain-
 ing or therewith usually held, occupied, or en-
 joyed, together with the said recited indenture of
 lease. And all the estate, right, title, and in-
 terest, legal and equitable, of her the said C. H.
 of in and to the same, by virtue of the same in-
 denture of lease, **TO HAVE AND TO**
HOLD the said three several messuages or tene-
 ments, and other the premises with their and
 every of their appurtenances unto the said C. D.
 his executors, administrators, and assigns, from
~~Lady-day~~ next ensuing the day of the Date of
 these presents, for and during all the rest, re-
 sidue, and remainder of the said term of _____
 years, in and by the said recited indenture of
 lease granted, which is now to come and unex-
 pired, subject only to the rent and covenants
 therein mentioned, reserved and contained from
 and after ~~Lady-day~~ next, on the tenant or les-
 see's part and behalf to be paid, kept, done, and
 performed; **AND** the said C. H. ~~doth~~ for herself,
 her heirs, executors, and administrators, cove-
 nant, promise, and agree to and with the said
 C. D. his executors, administrators, and assigns,
 by these presents in manner following, (that is
 to say) that the said recited indenture of lease
 now at the time of the sealing and delivery here-
 of, is a good and valid lease in the law of the
 premises thereby demised, and now is, and standi
 in full force and virtue, not forfeited, surren-
 dered, or otherwise incumbered, or made void,
 or voidable by her or the said E. H. deceased.
AND ALSO that she the said C. H. now at the
 time

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time of the sealing and delivery hereof, hath in herself good right, full power, and lawful authority, to assign and transfer all and singular the said premises with their appurtenances unto the said C. D. his executors, administrators, and assigns, in manner and form aforesaid, according to the true intent and meaning of these presents. AND ALSO that it shall and may be lawful to and for the said C. D. his executors, administrators, and assigns, from henceforth peaceably and quietly to have, hold, occupy, possess, and enjoy, all and singular the said premises, with their and every of their appurtenances, from *Lady-day* ———, and to receive the rents, issues, and profits thereof, to his and their own use and benefit, for and during all the rest, residue, and remainder, which is now to come and unexpired of and in the said term of ——— years, by the said recited indenture of lease granted without any let, suit, or interruption, of or by the said C. H. or any other person or persons, claiming or to claim, by, from or under her, or the said E. H. deceased; and that the said hereby assigned premises now are, and be, free and clear of and from all incumbrances whatsoever had, made, done, or suffered by the said C. H. or the said E. H. deceased, or any other person or persons whatsoever claiming, or to claim by, from or under her or him, the said yearly rent reserved by the said recited indenture of lease, and the covenants therein contained, which on the tenant's or lessee's part and behalf shall from *Lady-day* aforesaid grow due, and ought to be paid, kept, done and performed:

U 4

(only

(only excepted) AND FURTHER that she the said *C. H.* and all and every other person and persons claiming or to claim any estate or interest of in or to the said premises, or any part thereof, by from or under her or the said *E. H.* deceased, shall and will at any time hereafter upon the request and at the charge of the said *C. D.* his executors, administrators or assigns, make, do, and execute all and every such further and other lawful and reasonable acts, deeds, assignments, and assurances in the law whatsoever, for the better strengthening and confirming the assignment hereby made of all and singular the said premises, with their appurtenances, for and during all the remainder which shall be then to come and unexpired of the said term of ——— years, unto the said *C. D.* his executors, administrators and assigns, as by him or them, or his or their council learned in the law, shall be reasonably devised, or advised, and required. AND the said *C. D.* doth for himself, his heirs, executors, or administrators, covenant, promise, and agree to and with the said *C. H.* her executors and administrators by these presents, that he the said *C. D.* his executors, administrators or assigns, shall and will from time to time and at all times hereafter, during the remainder now to come and unexpired of the said term of ——— years, in and by the said recited indenture of lease granted, well and truly pay, or cause to be paid, the said yearly rent by the said indenture of lease reserved, and perform all and singular the covenants and agreements therein contained, and which from and after *Lady-day* last past, on the tenant's or lessee's part and behalf, are or ought to be

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be paid, kept, done, and performed, and of and from all actions, suits, recoveries, judgments, executions, costs, charges, damages, and expences whatsoever, that shall or may be commenced, obtained, recovered, or prosecuted against the said C. H. her executors or administrators, for or on account of the non-payment of the rent, or non-performance of the said covenants and agreements, or any of them, from and after *Lady-day* aforesaid, shall and will well and sufficiently save harmless and keep indemnified the said C. H. his heirs, executors, or administrators, their and each and every of their lands or tenements, goods and chattels. NOW THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, she the said C. H. hath bargained, sold, assigned, and set over, and by these presents doth bargain, sell, assign and set over unto the said C. D. his executors, administrators and assigns, Two several instruments or policies of insurance, by which the herein before recited premises are insured from fire in the *Hand-in-Hand* insurance office, bearing date respectively the ——— day of ———, in the year ———, and the ——— day of ———, in the year ———, and which said two policies are numbered as follows: No. 72,504 and No. 47,678; and all and every sum and sums of money thereby insured, and which may at any time or times hereafter become due, or payable by virtue thereof, together with all the right, title, property, benefit, and interest of her the said C. H. of in and to the said two several instruments or

U 5

policies of insurance, with all powers and remedies for the recovery thereof. In witness, &c.

Scaled and delivered.

N.B. This writing requires a 5s. stamp.

An Assignment of Policies of Insurance by Deed Poll.

I TO ALL TO WHOM these presents shall come E. U. of —, in the county of —, executor of the last will and testament of H. J. late of —, in the county aforesaid, gentleman, deceased, *sends greeting.* WHEREAS by several deeds poll, or policies of insurance, numbered as follows, viz. No. 48,888 and No. 48,889, and bearing date respectively the — day of —, in the year of our Lord —, and the — day of —, in the year —, and executed by D. C. and others, the trustees or directors of the *Hand-in-Hand* fire-office, two several sums of — pounds, and — pounds, are thereby insured from fire from the date hereof for the two several terms of — years, the said E. U. his executors, administrators and assigns, on two several timber houses, situate on the south side of —, in the parish of — aforesaid, being the *third* and *fourth* houses westward from —, and then, or now, or late in the several possessions of one R. B. W. M. of —, in the parish of — aforesaid, as by the said two several deeds poll, or policies of insurance, reference being unto them respectively had, may more fully appear. NOW KNOW YE, that the said E. U. for and in con-

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consideration of the sum of ~~£ 1000~~ pounds, to him in hand paid by the said *W. M.* (the receipt whereof is hereby acknowledged) *both* bargained, sold, assigned, and let over, and hereby *doth* absolutely bargain, sell, assign, and let over, unto the said *W. M.* his executors, administrators and assigns, the ~~aforsaid~~ two several rected deeds poll, or policies of insurance, and the monies that shall or may become due thereon; And all benefit and advantage thereof, and all his the said *E. U.*'s right, title, and interest, of in and to the same respectively. AND the said *E. U.* *doth* also hereby authorize and empower the said *W. M.* his executors, administrators, and assigns, in his or their own name or names, but to and for his and their own proper use, or for and in the name of the said *E. U.* his executors or administrators, to receive of and from the said trustees or directors, or their successors, the said monies that shall or may become due on the ~~aforsaid~~ two several rected deeds poll, or policies of insurance, and on non-payment thereof, or any part thereof, to sue for, recover and receive the same, and on payment thereof, or any part thereof, to give receipts, acquittances, or other discharges for the same; and all and whatsoever the said *W. M.* his executors, administrators, and assigns, shall lawfully do, or cause to be done, in and about the premises ~~aforsaid~~; the said *E. U.* *doth* hereby ratify, confirm, and allow, as fully and effectually as if he himself was personally present, and did the same, hereby granting unto him and them his full and whole power and authority in and about the ~~aforsaid~~ premises. IN WITNESS whereof the said *E. U.*

hath hereunto set his hand and seal the — day of —, in the year of our Lord —

Sealed and delivered, (being first duly *read*, and stamped) in the presence of —

N. B. This writing requires a 5s. stamp.

A Tenant's Attornment to his Landlord.

BE IT KNOWN unto all men by these presents, That *whereas* WE, whose hands and seals are hereunto put, DO severally hold several messuages or dwelling-houses with their appurtenances, at our respective names hereunto mentioned and particularly described, situate in —, in the county of —, or liberty of the same, heretofore in the possession of G. H. Esq; lately recovered from him, by an ejectment brought in the court of —, on the demise of R. S. Esq; and a writ of *habere facias possessionem* has been executed therein, by the Sheriff of the said county, and possession thereof delivered by him to the use of the said G. H. NOW WE, the said persons under named, do hereby severally attorn tenants, of and for the said premises in our respective holdings unto the said G. H. at and under the several yearly rents, and payable at the days and times at our respective names under-mentioned; he the said G. H. paying or allowing thereout all leys, taxes, and repairs. AND we have this day severally paid to H. H. for the use of the said G. H. *one shilling* for and in the name of such attornment. *In witness* whereof we have hereunto set our hands and seals

this

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this ——— day of ———, in the year, of our Lord ———.

Sealed and delivered, &c.

N.B. This writing requires a g. stamp.

*Note. To this attornment must be added a rental, with the particular times when each tenant is to at-
torn.*

*The Form of Lease in Ejectment, where the Premises
are uninhabited, to recover Possession.*

THIS INDENTURE made the ——— day
of ———, in the ——— year of the reign of
our Sovereign Lord George the Third, by the
Grace of God, of Great Britain, France, and
Ireland, King, Defender of the Faith, and so
forth, and in the year of our Lord ———,
BETWEEN *D. E.* of, &c. Esq; of the one
part, and *F. G.* of, &c. yeoman, of the other
part; WITNESSETH, That he the said
D. E. for divers good causes and considerations
him thereunto moving, both demised, granted,
and to farm letten, and by these presents both de-
mise, grant, and to farm let, unto the said *F. G.*
ALL that messuage or tenement, commonly
called or known by the name and sign of the
——, situate, lying and being in ———, in the
parish of ———, in the county of ———, and late
in the possession or occupation of one *H. I.*
TO HAVE AND TO HOLD the said mes-
mes-

suage or tenement, and premises, with the appurtenances, from the date of these presents, for, during, and unto the full end and term of *five* years from thence next ensuing, and fully to be complete and ended. PROVIDED ALWAYS, and on this condition nevertheless, that if the said D. E. his executors or administrators, shall, at any time after the — day of this present month of —, tender the said F. G. his executors or administrators, one *shilling*, then this present indenture and every thing herein contained shall be void, and of none effect, any thing herein contained to the contrary in any wise notwithstanding. In witness, whereof the said parties to these presents have hereunto interchangeably set their hands, and seals, the day and year first above written.

Sealed and delivered (being first duly stamped) in the presence of.

N.B. This writing requires a S. stamp.

A Landlord's Notice to a Tenant to quit.

SIR,

I DO hereby give you notice to quit the house and garden you hold of me, situate at —, in the county of —, at the yearly rent of — pounds per year, on or before *Midsummer* day next,

Dated the — day of —,

Yours, &c.
J. H. landlord of the said premises.

To T. T. the tenant there,

A T.

A Tenant's Notice to his Landlord to quit his Premises.

SIR,
I HEREBY give you warning of quitting your house on or before *Lady-day* next, of which be pleased to take notice. Dated ——— day of ———.

From your humble servant.

D. C.

To Mr. G. M. the landlord of the premises.

A Warning from a Landlord to his Tenant to quit Possession, in the Common Form.

I DO hereby give notice to quit possession of (here describe the premises particularly, whether lease, lodgings, chambers, farm or lands, &c.) situate in the parish of, now in your own possession, or in the possession of ———, (as the case is) which you hold at will, or by virtue of an agreement of lease, (as the case is) Dated the ——— day of ———. Witness my hand this ——— day of ——— 17

A. B. Landlord, or C. agent for
the said Mr. A. B. legally authorized.

To Mr. J. S. the tenant.

In Another Form.

Mr. F. H.

I HEREBY give you notice to deliver up the possession to Mr. T. K. of the messuage or dwelling-house, with the appurtenances, which you rent of me in —, in the county of —, on Lady-day next, being the — day of — 17 —
Yours, &c.

To Mr. J. H. the tenant these, D. C.

TO Mr. D. H. the land of the ...
...
...
...
...
...

the said M. A. & locally authorized
A. B. Langford, or C. agent for

To Mr. J. S. the second

THE T A B L E,

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P R E F A C E.

THE vast Pile and Extent of Buildings lately erected in this Metropolis and its Environs, hath much increased the Inquiries concerning the Law of Landlords and Tenants, Lessees and Lodgers, in so much that a particular Attention to them, especially to the latter, was deemed necessary in this Publication.

In Chap. 11. Folio 344. of the following Sheets, the Reader will find a full and satisfactory Abstract of the last Building Act, viz. Stat. 14 Geo. 3. Chap. 78. for the further and better regulating Buildings, and party Walls; and for the more effectually preventing Mischiefs by Fire, within the Cities of London and Westminster.

P R E F A C E.

By this Act most of the former Laws respecting the Subject are either totally repealed, greatly improved, or materially altered; and as the Buildings erected contrary to this Act, may be pulled down, it concerns all, any ways interested, to peruse the Law in Question, before they presume to engage themselves in Brick and Mortar.

In Chap. XII. is discussed that very important Subject, the Laws of *England* concerning Lodgers and their Landlords, a Subject of universal Concernment, though so very little understood; the Reader will find in this Book, for the *first* Time, the Doctrine minutely investigated, particularly in regard to the Remedy for recovering of Rent, and of getting rid of a troublesome Lodger.

There is added to this Edition, an Appendix of Forms and Precedents, of all Instruments, Notices, Agreements, and Writings, that either Landlord, Tenant, or Lodger can require, in any material Occurrence between them.

Besides

P R E F A C E.

Besides the above Improvements, the Service of a Declaration in Ejectment, is well considered, which is the first Process in that Proceeding, and consequently the Ground and Foundation of all subsequent ones, and therefore if the Service is irregular, however well advised, or with however much Skill the Declaration and Notice are drawn and settled, it will avail nothing; therefore the Reader is referred to Folio 173 for the Service of a Declaration on the Tenant, when he is in Possession of the Premises in Dispute; to Folio 175. for the Service thereof, in the Tenant's *accidental* Absence, and to Folio 179, for such Service, on the Tenant his wilful Absence, or on his absconding.

These are the principal, but not all the Improvements in this new Edition, those however will occur to the Reader on his having recourse to, and perusing the Title Page, which purposely comprehends almost an Epitome of the Book, this together with the

PREFACE

the alphabetical Index, at the End, which is also very full and copious, will, it is imagined, be an unerring Guide to every Particular contained in the following Sheets, and which the Reader may thereby find with Ease and Expedition.

well advised, or with how many Vacations A. R. Declaration and Notice are given, it will avail nothing; therefore the Reader is referred to Folio 173 for the Service of a Declaration on the Tenant, when he is in Possession of the Premises in Dispute; to Folio 175 for the Service thereof in the Tenant's actual Absence, and to Folio 179 for such Service on the Tenant his usual Absence, or on his absence.

THESE are the principal, but not all the improvements in this new Edition, those however will occur to the Reader on his having recourse to, and perusing the Table, which purports comprehends almost an Epitome of the Book, this together with the

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